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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1969 ~~1969~~ 1970

No. 962 ~~1969~~ 62

MONITOR PATRIOT CO., ET AL.,
PETITIONERS,

v.

ROSELLE A. ROY, ETC.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

PETITION FOR CERTIORARI FILED NOVEMBER 28, 1969

CERTIORARI GRANTED FEBRUARY 24, 1970

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CHRONOLOGICAL LIST OF IMPORTANT DOCKET ENTRIES

1. Copy of special declaration in writ.
   Dated: November 2, 1960.
   Entered: December, 1960.
2. Answer of Defendant Monitor-Patriot
   Entered: January 23, 1961
3. Pre-Trial Order
   Dated: March 4, 1965
4. Amended Answer of Monitor Patriot-Company and North American Newspaper Alliance, Inc.
   Filed: December 20, 1966.
5. Trial Commences, Hillsborough County Superior Court. December 5, 1966.
6. Verdicts for plaintiff returned.
   December 20, 1966.
7. Defendant's post-trial motions denied. June 19, 1967.
8. Transferred case is filed with Hillsborough Superior Court. November 1, 1967.
9. Opinion and Judgment of the New Hampshire Supreme Court. June 30, 1969.
10. Motion for Re-Hearing Denied. July 30, 1969.

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT

To the Sheriff of any county or his deputy, we command to attach the goods or estate of Monitor Patriot Company, a New Hampshire corporation, with its primary place of business at three North State Street, Concord, County of Merrimac, in State of New Hampshire; and Bell Syndicate, Inc., a foreign corporation, with its principal offices at 229 West 43rd Street city and state of New York.

To the value of One hundred thousand ($100,000) and summon them if to be found in your precinct to appear at the Superior Court in Nashua, in said county of Hills-

borough on the first Tuesday of 1960 to answer to Alphonse Roy of 28 Candia Road, Manchester, County of Hillsborough and state of New Hampshire.

[Copy of special declaration in writ]

IN A PLEA OF TRESPASS AND LIBEL for that before and at the time of the wrongs herein complained of plaintiff was an upstanding and respected citizen, duly licensed and engaged in the real estate business in the State of New Hampshire, had in the past held high elective and appointive public office, including membership in the United States Congress, service on the Governor's Council of New Hampshire, in the Legislature of New Hampshire, as a member of the Board of Aldermen of the City of Manchester, and as United States Marshall; that at such time plaintiff was a candidate for election to the United States Senate; that the defendant Monitor-Patriot Company was at all times hereinafter mentioned, and is now, engaged in the business of publishing a daily newspaper in Concord, New Hampshire, to wit, *The Concord Daily Monitor and N.H. Patriot;* that said newspaper enjoys a general and widespread circulation in the State of New Hampshire and elsewhere; that the defendant Bell Syndicate, Inc., was and is a corporation with its principal offices in the City and State of New York, engaged primarily in the business of purchasing news and feature articles and stories and selling them for simultaneous publication to large numbers of newspapers throughout the United States, including said *Concord Daily Monitor and N.H. Patriot;* that among the materials so sold and published by said Bell Syndicate, Inc. was and is a daily political and gossip column written by or under the supervision and direction of one Drew Pearson, and published under the name and style "D.C. Merry-Go-Round"; that said column was and is read, discussed and commented upon by hundreds of thousands of persons in New Hampshire and elsewhere; that on or about September 10, 1960,

the defendant Bell Syndicate, Inc., through its agents, servants and associates, including said Drew Pearson, did write and cause to be sold, published and circulated in said column, and the defendant Monitor-Patriot Company did print, publish, and cause to be distributed and circulated in said State of New Hampshire and elsewhere, so as to be read, discussed and commented upon by readers of said newspaper, certain vicious, untrue, scandalous, malicious, and defamatory libels of and concerning the plaintiff, to wit:

"One of [Democratic candidate for U.S. Senate] Hill's primary opponents, Frank L. Sullivan, was released from the Grasmere County Work Farm just in time to file for the Senate. With a police record of no fewer than 19 convictions for drunkenness since 1945, he was serving his latest 90-day sentence."

Curious Call

"To make sure he would get out in time to run for the Senate, a former small-time bootlegger and later U.S. Marshall, Alphonse Roy, telephoned the Grasmere warden about Sullivan."

"Ralph LaVallee, in charge of Grasmere, admitted to this column that he had received a telephone inquiry from Roy as to whether Sullivan would be released in time to file. But the warden denied another report that Roy announced he was calling 'on behalf of my friend Styles (Bridges, Republican U.S. Senator from New Hampshire).' "

" 'I don't want to get implicated in anything like that,' said LaVallee. 'Roy didn't mention Senator Bridges.' "

"Sullivan happily got out of the workhouse in time to run for the most distinguished legislative body in the world. And who should turn up on the ballot but the same Alphonse Roy who was so eager to get him out of the clink."

"Because of the peculiar population division of New Hampshire, The Irish Catholics may be inclined to vote for a Frank Sullivan while The French Canadians could be attracted by a name like Alphonse Roy. The effect would be to cut down on Herb Hill's chances.";

that by the publication of this column and these words the defendants intended to convey, and did convey, to readers thereof the meanings and impressions (1) that the plaintiff at one time sold, and engaged in the business of selling and illegally transporting, intoxicating liquor, criminal actions in violation of the laws of the United States and the State of New Hampshire, (2) that plaintiff was improperly attempting by underhanded means to secure the release from jail of said Frank L. Sullivan for the purpose of inducing him to run as a straw or fraudulent candidate for the Democratic nomination to the United States Senate, thereby rigging and fixing this election in favor of plaintiff's own candidacy therein, and (3) that the plaintiff was improperly and unethically cooperating with and assisting a candidate for the same office in the opposing political party, the Republican Senatorial incumbent, Styles Bridges, for money or other consideration, in an attempt to induce said Sullivan to run as a straw candidate in the Democratic primary Senatorial balloting, in order to bolster the reelection prospects of said Bridges by rigging and fixing said election in his favor; that said false and vicious publication was calculated to, and did, hold plaintiff up to public scorn, hatred, contempt, disgrace and ridicule, and was, in addition, written, published, and circulated maliciously, recklessly, and in bad faith for such purposes; that as a direct result of said publication plaintiff personally suffered great mental anguish and severe injury to his theretofore good name, reputation, credit, and standing in the community, was caused to lose the esteem of the public and innumerable votes in the election in which he was

a candidate at the time of said publication, and, in his capacity as a businessman, suffered great loss of business reputation, volume, clients and customers; and was otherwise greatly injured in his good name and political and business reputation, and suffered losses and expenses; ALL TO HIS DAMAGE, as he says in the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000).

[Dated November 2, 1960]

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT.

JANUARY TERM, 1960

DMR

Civil No. 5755

ALPHONSE ROY,

PLAINTIFF,

vs.

MONITOR-PATRIOT CO. and

NORTH AMERICAN NEWSPAPER

ALLIANCE, INC.,

DEFENDANTS.

ANSWER OF DEFENDANT MONITOR-PATRIOT COMPANY

[Filed Jan. 23, 1961]

Now comes the defendant Monitor-Patriot Company, and says that it is not guilty as the plaintiff has alleged in his writ and of this it puts itself on trial.

And the defendant makes the following brief statement of defense under the above issue:

1. It admits on September 10, 1960, there was published in the Concord Daily Monitor and New Hampshire Patriot an article which contained the language complained of and

which was in words and figures as set forth in Exhibit 1 attached hereto and made a part hereof.

2. It says that the words of which plaintiff complains do not bear, were not understood to bear and are incapable of bearing or being understood to bear any of the meanings alleged in the writ or any defamatory meaning; and it denies each and every other allegation contained in the writ.

3. The words of the article complained of conveyed the thoughts expressed by the ordinary and natural signification of the words and not the thoughts expressed in the innuendoes contained in the writ, and when read in their entirety in their ordinary meaning and signification and without the meaning imputed in the innuendoes, the article complained of was true in substance, published in good faith with justifiable purpose and without malice towards plaintiff.

4. The matter complained of was published in the ordinary course of business, in good faith, without malice and not for the purpose of causing harm to plaintiff. Defendant acted in good faith with good motives upon a lawful occasion and believed and had reasonable and probable cause to believe that the statements published by it were true.

5. The words of the article complained of conveyed the thoughts expressed by the ordinary and natural signification of the words and not the thoughts expressed in the innuendoes contained in the writ and when read in their entirety, in their ordinary meaning and signification and without the meaning imputed in the innuendoes, the statement of facts contained therein is substantially true and the statements of opinion contained therein constitute reasonable, fair and bona fide comment on matters of public interest. Such comment was published in good faith, without malice, based upon reasonable or probable cause and for the purpose of informing the public upon matters of

public concern based on true or privileged statements of fact or facts already known or available to the public.

6. The matter complained of was a republication by the defendant of a nationally distributed news article sent out by a reputable news agency, namely, Bell Syndicate, Inc., and was published in good faith, without malice, and with reasonable cause to believe that the statements therein were true.

[Title omitted]

HILLSBOROUGH, SS. SUPERIOR COURT

PRETRIAL ORDER

At the pretrial hearing of the above entitled action, held at Manchester, on February 23, 1965, before The Honorable William W. Keller, Presiding Justice, the parties being represented by counsel, namely,

For the Plaintiff:

McLane, Carleton, Graf, Greene & Brown

By: Stanley M. Brown, Esq.

Bois & Laflame (Not Present)

For the Defendants:

Devine, Millimet, McDonough, Stahl & Branch

By: Joseph A. Millimet, Esq.

the following stipulations were made and agreed upon:

* * *

2. It is agreed that the defendants are now the Monitor-Patriot Company and the North American Newspaper Alliance, Inc. The Bell Syndicate, Inc. which was formerly a party defendant is no longer a party; the Bell Syndicate, Inc. went out of corporate existence in 1959 becoming merged with the North American Newspaper Alliance, Inc. After the merger and at the time involved in this case the name Bell Syndicate was used as the name of a Department of the North American Newspaper Alliance, Inc.

3. At the time involved in this case the North American Newspaper Alliance, Inc. had a contract with Drew Pearson relative to the sale and distribution of his column for newspaper publication throughout the world.

4. The plaintiff claims that a certain contract, dated June 14, 1956, between Drew Pearson and the Bell Syndicate, Inc., was a valid contract in force in September, 1960. The defendants cannot agree that this contract was valid or in force on that date, and even if it was, cannot agree that it would be competent evidence.

* * *

13. The plaintiff claims malice on the part of both defendants. The plaintiff claims malice on the part of Drew Pearson which is attributable to both of the defendants. The plaintiff claims that malice on the part of any agent or employee of Pearson is the same as malice on the part of Drew Pearson.

14. The defendants deny any malice and claim that even if there were malice on the part of Drew Pearson it is not attributable to the defendants, especially if it was malice on the part of an employee or agent of Drew Pearson, or a volunteer. The plaintiff in addition to its general claim as to the contract being material, claims in particular that it is material on this issue.

15. The defendants also claim privilege on the basis that the plaintiff was a public figure and a candidate for office. The defendants also claim that the article was true as to Mr. Roy.

* * *

19. Brother Millimet has agreed to contact his clients to see whether or not he can obtain authority to disclose whether Drew Pearson is in control of the case and to advise Brother Brown as to what the situation is, and he is to do this forthwith.

* * *

WHEREFORE, it is ordered that the subsequent conduct of the trial be controlled by and subject to the foregoing, unless modified at the trial thereof to prevent manifest injustice.

Dated at Manchester this 4th day of March, 1965.

WILLIAM W. KELLER
Presiding Justice

HILLSBOROUGH, SS. SUPERIOR COURT

[Title Omitted]

AMENDED ANSWER OF DEFENDANTS MONITOR-PATRIOT COMPANY AND NORTH AMERICAN NEWSPAPER ALLIANCE, INC.

[Filed Dec. 20, 1966]

NOW COME the defendants Monitor-Patriot Company and North American Newspaper Alliance, Inc., and say that they are not guilty as the plaintiff has alleged in his writ, and of this they put themselves on trial.

And the defendants make the following brief statement of defense under the above issue:

1) They admit on September 10, 1960, there was published in the Concord Daily Monitor and New Hampshire Patriot an article which contained the language complained of and which was in words and figures as set forth in Exhibit 1 attached hereto and made a part hereof.

2) They say that the words of which the plaintiff complains do not bear, were not understood to bear and are incapable of bearing or being understood to bear any of the meanings alleged in the writ or any defamatory meaning; and they deny each and every other allegation contained in the writ.

3) The words of the article complained of conveyed the thoughts expressed by the ordinary and natural significa-

tion of the words and not the thoughts expressed in the innuendoes contained in the writ, and when read in their entirety in their ordinary meaning and signification and without the meaning imputed in the innuendoes, the article complained of was published in good faith with a justifiable purpose, on a lawful occasion, and without malice towards the plaintiff.

4) The matter complained of was published in the ordinary course of business, in good faith, without malice and not for the purpose of causing harm to plaintiff. Defendants acted in good faith with good motives upon a lawful occasion and believed and had reasonable and probable cause to believe that the statements published by them were true.

5) The words of the article complained of conveyed the thoughts expressed by the ordinary and natural signification of the words and not the thoughts expressed in the innuendoes contained in the writ, and when read in their entirety, in the ordinary meaning and signification and without the meaning imputed in the innuendoes, the statement of facts contained therein were based on a reasonable belief in their truth, and the statements of opinion contained therein constitute reasonable, fair and bona fide comment on matters of public interest. Such comment was published in good faith, without malice, based upon reasonable or probable cause, and for the purpose of informing the public upon matters of public concern based on privileged statements of fact already known or available to the public.

6) The matter complained of was a republication by defendant of a nationally distributed news article sent out by a reputable news agency, namely, Bell Syndicate, Inc., and was published in good faith, without malice, and with reasonable cause to believe that the statements therein were true.

7) The matter complained of was distributed by the defendant NANA without malice, and with reasonable cause to believe that the statements therein were true.

8) The defendants neither knew nor had any reason to know that the matters complained of were libelous and untrue.

STENOGRAPHIC TRANSCRIPT OF TESTIMONY

* * *

[117] TESTIMONY OF JAMES M. LANGLEY

* * *

who was called by the plaintiff, and having been first duly sworn, was examined and testified as follows:

Direct Examination

[By Mr. Brown]

Q. What is your name, sir? A. James M. Langley.

Q. And you live where? A. Bow, New Hampshire.

Q. And what is your business or occupation, Mr. Langley? A. I'm a newspaperman.

Q. And have been for how long? A. Since I was five years old.

* * *

[118] Q. Mr. Langley, your present connection in the newspaper field is with what publication? A. The Monitor Publishing Company.

Q. Going back to September of 1960, what was your connection with the Monitor at that time? A. I was president and treasurer of the Monitor-Patriot Company and principal stockholder.

* * *

[119] Q. Let me ask you, Mr. Langley, is there a well-recognized distinction observed by you gentlemen in the field of journalism between news reporting and comment? [120] A. Yes.

Q. And what, generally, is the demarcation, one with the other? A. Well, news, which is the principal function of a newspaper, is to record accurately the events of each day. What we call editorial matter is opinion, expressed by whoever writes it. That, as far as the papers I have — as far as the Monitor is concerned, is kept on one page of opinion, a so-called editorial page.

Q. Now, Mr. Langley, what is the situation with these big-name or syndicated, widely-spread columnist material? Is that classifiable as factual material or opinion, or does it contain some of each, or what is the situation? A. They usually contain some of each, but in the Monitor we keep them on the editorial page.

Q. Since there is some comment, interpretation of the writers involved in the column, in your paper you keep all of that material on the editorial page? A. Almost always, yes.

Q. At least at — at least you start them on there? A. That's where it belongs, yes.

Q. About what was the circulation of the Concord Monitor in September of 1960 when the article which is in dispute here was published by the Monitor, sir? [121] A. On September 10, 1960, the copies sold were 12,062.

* * *

[127] Q. [By Mr. Brown] Now, let me ask you, Mr. Langley, how long before September of 1960 would you judge your paper had been receiving and publishing Mr. Pearson's column? Do you have in mind about how long it was? A. It was sometime in the late 1950's when the column was taken on. We used to print Dorothy Thomson's column. She died or discontinued her column, and while I

was absent for [128] two years in Pakistan, Mr. Newell, who acted as acting publisher in my absence, substituted the Pearson column for the Thomson column.

Q. Well, suppose we can fix the time as best we can? You were a special envoy representing the United States in Pakistan about what time? A. From the middle of 1957 to the middle of 1959.

Q. So that it was while you were abroad that the column first started to run regularly in the Monitor? A. Yes, sir.

Q. Now, if you know, sir — and I want to direct your attention to the situation before and leading up to September of 1960 — how was the material for this column given into the possession of the Monitor? Did you get it by wire, mail or what? A. We got the Pearson column and our other columns by mail.

Q. And in what form, Mr. Langley? A. At that time it was in mimeograph form.

Q. Up to 1960? A. Through 1960, yes.

Q. How regularly would columns be submitted to the paper for publication? A. If it — it was a daily column. [129] Q. And how much of a time lag, Mr. Langley, was there between the time that the column came into the possession of the newspaper and the column's being published? A. Ordinarily overnight.

Q. In other words, this column that was published on September 10th in ordinary routine would have gotten to you perhaps the preceding day? A. That's right.

Q. What was your practice and custom at your newspaper, Mr. Langley, with respect to editing Pearson's column? A. All the feature material went through the news room. This is only one of numerous features which the paper prints.

Q. Well, I'm sure that that means something to you. What, actually, is the connotation? What do you mean, it went through the news room? A. That the handling of it,

the editing of it, and the sending of it to the composing room for composition and inclusion in the paper was handled by the news department.

Q. Well, the routine there would be that this is copy for possible publication that comes in daily, and it gets into somebody's basket for determination whether or not to publish it? A. Well, the determination, of course, is to publish it every [130] day. You make that determination when you buy it, of course.

Q. That's what I'm trying to get at. So far as Pearson's column is concerned, you bought it and you paid for it. When it came in, was it merely a matter of fitting it into the newspaper or was it critically edited? A. No. It's supposed to be read and edited.

Q. Who is supposed to read and edit it? A. That was the responsibility of the news department. It was delegated by the managing editor, Mr. Newell, in this instance, to Enoch Shenton.

Q. When you say "in this instance," Mr. Langley, before coming here to testify you were able to ascertain that this particular column of September 10, 1960, was assigned by Mr. Newell to Enoch Shenton for the purpose of editing before publication? A. Yes.

Q. And can you tell us whether in fact Mr. Shenton did edit it, or was it published in precisely the same form that it came to your paper? A. That I don't know.

* * *

[133] Q. Well, what would be the circumstances in which you would delete items from a column for which you have agreed to pay and were going to pay? A. Quite often we shorten the column by deletion in order to make it fit, to fit the available space.

Q. Well, thank you. Was there any editing of the column for other than space requirements as a normal thing with your paper? A. It should be read. If there were

occasion for error, if they discovered anything which they considered an error, questionable, they should have edited it. Now, to what extent they did in the news room, I can't tell you personally.

Q. What procedures, if any, Mr. Langley, were in effect at the Concord Monitor in September of 1960 with respect to defamatory material coming in in a syndicated column? Was there any? A. I don't understand your question.

Q. Well, Mr. Langley, you've already told the jury that you were born, bred and grew up in the newspaper business. You know what the term "defamation" is? You know what it means? [134] A. I think so, yes.

Q. Was there any procedure, control, in effect at the Concord Monitor that required anyone to review syndicated material for the purpose of passing judgment as to whether or not what was contained in it was defamatory? A. The news room had general instructions from me as general manager to print the news without fear or favor but to print it accurately. Now, that's where my instructions ended.

Q. Well, let's take the article that we're talking about here. In the September 10th "D. C. Merry-Go-Round" which your paper printed, the columnist starts out talking about public officials taking free rides on government airplanes, doesn't he? Do you recall? A. Yes, sir.

Q. Did you have at your newspaper, Mr. Langley, any facilities to check whether what Mr. Pearson was saying in those regards was true or false? A. We have no means. We have to buy columns, the Associated Press news, and so on, and we have to take them on faith. We do not have the facilities or the means or the time to go back and recheck everything which is delivered to us, even by our own town correspondents.

[135] Q. That's what I'm getting at, sir. Isn't the fact of the matter — isn't the fact of the matter that in Septem-

ber of 1960 you printed Drew Pearson as Drew Pearson's material was delivered to you, assuming without knowing that what he gave you was responsible reporting, responsible comment, that was fit to print? A. We assume that Mr. Pearson, who has been a newspaper man for a great many years, is a responsible reporter.

Q. And therefore you relied upon him rather than making an independent check yourselves as to him comments? A. Because it's impossible for us to make the check you suggest in the time limit in which we have to print the thing.

* * *

[136] Q. Mr. Langley, you've been in the newspaper business longer than I have been practicing law, and I used to sell your newspapers for you, as you recall, years ago. You don't have any obligation to print that column at all, do you, as a newspaper column? A. Once we start printing a daily column, we, in a sense, promise our readers that column each day, and so we print it each day without interruption if it's possible to do so. In other words, a daily newspaper becomes a daily reading habit with readers, and you don't break the continuity on features which run daily if you can help it.

Q. Because if you do, you might lose sales of your newspaper? A. We lose the interest of the readers.

Q. And thereby lose the sales? A. That might result, yes.

Q. Is there anything in the content of that September 10, 1960, Drew Pearson column that required its publication on that [137] day, or could the whole thing have been published the next week and be just as timely as a matter in your paper? A. If we had had the next week's copy to substitute for this, why, it wouldn't have inconvenienced us.

Q. So that there was no necessity of publishing this from a news point of view except to fill your paper?

Mr. Reynolds: I'm going to object, your Honor. This is a story about a primary that's going on, a pre-primary fight, and the following week there wouldn't be any argument about a primary.

The Witness: That portion of the column which refers to the primary, that is true; it was timely.

Q. [By Mr. Brown] Was there any judgment given to the column on that basis, Mr. Langley, or was the situation merely that you printed it merely because you bought it, paid for it, and had a hole in your paper if you didn't print it — if you know? A. I personally don't know because I didn't handle the copy.

* * *

[138] [Column complained of read to the jury in its entirety]

Q. [By Mr. Brown] Now, Mr. Langley, the Concord Monitor did have facilities available, and there were people on the staff of that paper who were knowledgeable enough to be able to ascertain whether or not Roy was a former bootlegger, isn't that so — you know, if anybody recognized, perhaps — if it were recognized that this was something that [139] should be checked out before publishing? Would you agree that's so or not? A. They apparently didn't think it needed checking out because it came from a reliable source, Mr. Pearson.

Q. Now, as a matter of fact, Mr. Langley, you, yourself, were familiar with and knew Mr. Roy personally before this publication, didn't you? A. I had had conversation with Mr. Roy, so far as I can recollect, only once, way back when he was on the Governor's Council.

Q. And you were in public office at the same time, were you? A. I was Chairman of the State Planning and Development Commission at the time.

Q. And what was the circumstance of your meeting Mr. Roy while he was on the Governor's Council and you were on Planning and Development? A. I either went to or was called to — and I don't remember which — to the Council chambers where a meeting was to take place of the Governor and Council; and Mr. Roy, whom I did not know, came over and told me who he was and asked me how many jobs there were on the Planning and Development Commission for him.

Q. What did you take it he meant when he asked you how many [140] jobs for him you had? Did you take it to mean how many jobs he personally could have?

Mr. Reynolds: Excuse me. I want to object, your Honor, if the purpose of all this inquiry is to show some long-harbored ill feeling by Mr. Langley for Mr. Roy, because we're now talking about 1932. For the reasons we have mentioned to the Court, we feel this is all too remote on the issue here. Will the Court note my exception if this is allowed to continue for this purpose?

The Court: Do you wish to be heard, Mr. Brown?

Mr. Brown: Your Honor, I desire to continue this line of examination. I am attempting to lay a foundation for some other evidence toward which I think my brother's objection is actually intended to be directed.

Mr. Reynolds: I'm aware he's laying this foundation, your Honor, and I don't know when is a timely time to step in and make [141] these objections, so I'm just doing it now.

The Court: I will overrule the objection. Your exception may be noted.

[Question read]

Q. [By Mr. Brown] What did you have in mind that Mr. Roy meant? A. I felt he had in mind patronage.

Q. Jobs for people in the Third Councilor District? A. Jobs which he would pick the individuals for.

Q. Now, Mr. Reynolds suggested that this meeting between you and Mr. Roy occurred in 1932, and I think the record will be that 1932 was the first year that Mr. Roy was a member of the Governor's Council. Would it be your judgment that 1932 was the time? A. I don't recall the exact time but I think it was shortly after the Planning and Development Commission had been created; and you can fix the time from that, I think.

Q. Well, Governor Winant, I believe, was the Governor during the first time Mr. Roy was on the council. Was it during Governor Winant's term? A. As I recall it, it was during Styles Bridges' term.

Q. And that would have been the second of Mr. Roy's terms and [142] would be the period '32 to '34? A. Well, I haven't got those dates in mind.

Q. Very well. A. But it was during that period.

* * *

[143] Q. Do I understand you correctly to say this is the first time you met Mr. Roy? A. That's right, the first time. The last time — the next time I met him was yesterday.

Q. And you haven't met him until yesterday? A. In between I don't recall — I know I haven't talked with him that I can recollect. I might have seen him. Yesterday I didn't even recognize him till somebody told me who he was.

[144] Q. Well, how did it happen, Mr. Langley, that some eleven years after that chance discussion, or few words with Mr. Roy, how did it happen that eleven years later you still —

Mr. Reynolds: I am going to object, your Honor. He's going to offer, as I understand it, something from the Concord Monitor. May I approach the bench?

The Court: Yes.

We'll take the afternoon recess at this time, gentlemen. You may retire for the recess.

At The Bench During The Recess

Mr. Reynolds: Brother Brown — and I can be corrected — was about to pull out, get in through this means, the 1945 editorial — am I correct? If I am not, I am premature.

Mr. Brown: I wasn't about to offer the editorial. I was going to start some interrogation about it, yes.

Mr. Reynolds: Then maybe I'm not premature. The editorial, which maybe we can mark [145] for identification and then the Court can read it, if it hasn't already, was written in June of 1945, or some time like that, upon Alphonse's appointment to United States Marshal, and it's an editorial written by James Langley; and I assume it's offered for the purpose to show malice because that's why we're here. And I say that to offer this on that point, to show malice fifteen years later, is too remote in time, it's prejudicial, and I had cited this earlier case which I have outlined, which was the Keogh v. Pearson case. I took it from the Nashua library, and they brought it up here to return it to me, but it isn't mine. But in that case they held ten years was too remote, and on appeal they tried to change it and it wasn't permitted. In other words, the lower court was affirmed in its decision that [146] something like ten years was too remote. For all those reasons, your Honor, I object to going into this subject or offering the article; and if the Court is going to permit it, I want my exception noted because I don't want to have to jump up when he goes to put it in. Maybe we should decide the whole thing now.

Mr. Brown: I don't know how the Court can decide now without knowing what the balance of the evidence or the balance of this witness's testimony is going to be. I do think it's rather interesting that the witness recalled a chance encounter which occurred in 1932 or 1934 and still held a low opinion of Roy some eleven years later without even having seen the man in the interim; and that may distinguish it from the Keogh decision, because if a low opinion in Mr. Langley's mind prompts him to write a critical [147] editorial twelve years later concerning a chance en counter, so much more reason to assume that the same animosity will be continued another fifteen.

The Court: The objection has been made. I will overrule the objection. Exception noted.

* * *

[148] *Before The Jury*

Q. [By Mr. Brown] How does it happen, Mr. Langley, that eleven years later you still remembered that chance few words with Mr. Roy to the extent that you had adverse editorial comment about him on the basis of it? What was the reason that that stayed in your mind for that period of time? A. You refer to the — eleven years atfer — to an editorial which I wrote, I think?

[149] Q. Yes. In which you referred to Mr. Roy as being a political hack, that the President made an error in naming him United States Marshal, that he did nothing for the good of his party, his country or anyone else in public office. The lead editorial of June 7, 1945, sir. Do you recall the circumstance? A. I recall the editorial. I was, of course, commenting upon a political appointment Mr. Roy had been appointed by President Truman to a job for which I didn't feel he was competent. That's a routine editorial

function. I supported President Johnson when he ran for president, but I had never met him, seen him.

Q. Mr. Langley, in that editorial, you did take a rather severe position with respect to Mr. Roy as a public servant, didn't you? A. That's right.

Q. And am I correct in saying that you called him a "political hack"? A. I did.

Q. And indicated that he rendered no real service to his party or to the public or to himself in public office? A. That's right.

Q. And this was based on one chance meeting with the man [150] eleven years before? A. Not at all.

Q. Well, what else? That's what I'm trying to get at. What else did you know about Roy? A. It was based on general knowledge.

Mr. Reynolds: Excuse me, your Honor. I think since he's referred to the editorial, I think it should be marked at least for identification.

Mr. Brown: I'll offer it as an exhibit, generally. Subject to my prior objection about this whole line of inquiry, your Honor, I'll agree.

The Court: Very well. It may be marked.

Mr. Reynolds: Would it be out of order for Mr. Brown to read it now that it has gone to the jury?

The Court: Excuse me. Let Mr. Sheehan mark it.

Mr. Reynolds: I'm sorry.

[Marked Plaintiff's Exhibit #4]

* * *

[155] Q. [By Mr. Brown] Now, Mr. Langley, this editorial represented your thinking about Roy at that time; correct? A. That's right.

Q. And it was written by you personally and published as an editorial comment of your own opinion? A. Until it became the newspaper's opinion.

Q. Yes, but I say, it wasn't disguised as a news item; it

was [156] stated as an opinion; correct? A. It's an opinion.

* * *

[157] Q. Mr. Langley, in spite of the fact you wrote a critical editorial about that appointment, could we expect your newspaper, on the same date, ran a straightaway news item on the appointment, giving the man's qualifications? A. We may have run it. We probably ran a story on his appointment, but I don't know when or what the story was.

Q. Well, the appointment was of some importance, newswise, in the state? A. Oh, yes.

* * *

[158] Mr. Reynolds: Defendants have no objection. Is it to be marked as a full exhibit?

The Court: Do you offer it, Mr. Brown?

Mr. Brown: Yes, your Honor.

The Court: Plaintiff's Exhibit 5.

[So marked]

Mr. Brown: With the Court's permission, I desire to read the article for which I introduced the exhibit to the jury.

The Court: You may proceed.

[Article read in its entirety by Mr. Brown]

Q. [By Mr. Brown] Mr. Langley, do you have any recollection who the prominent democrats were that supposedly were joining with prominent republicans to block this nomination? A. I do not. I didn't write the news story.

Q. And do you know whether or not the republican senators attempted to block the nomination? Do you have any recollection? [159] A. I don't recall.

Q. Any member of your staff, sir, who knew from your files on Roy — I'm talking about your news files rather than your editorial opinion files — would have known that Roy, in 1960, was more than a former U. S. Marshal and

small-time bootlegger when you're talking about his being in a political primary — isn't that so? A. May I have the question again, please?

Q. Perhaps it's not a good question, Mr. Langley. I put the news story of the appointment as Marshal, which has been marked Plaintiff's Exhibit 5, in evidence, sir, to indicate to the Court and jury that the Concord Monitor's staff knew, at least in 1945, that Mr. Roy had had, up to that point, an active political career, including the nomination for and election to important offices in the state and federal government. That's so, isn't it? A. Yes.

Q. And there's no reason to believe that people on the staff of the Monitor in 1960 would have forgotten the fact that the man had been the last Democratic congressman at that point, the most recent one? A. I don't know on that point. When was Stevens congressman?

* * *

[161] Q. [By Mr. Brown] As a newspaperman, Mr. Langley, what is the reason — what purpose is there served by referring to Roy in the article of September 10, 1960, as a former small-time bootlegger? What's the reason? What's the news reason? Is there any? A. I didn't write that. You would have to ask Mr. Pearson or Mr. Anderson, whoever wrote it.

Q. Well, I'm going to when they get here. A. Well, I can't answer for them.

Q. Well, all right. Do you recall—

Mr. Brown: Strike it out.

With respect to the part of the article that we're complaining about, the one of September, 1960, the part that refers to that senate campaign, there is reference to a Ballot Law Commission proceeding that was held. Do you recall that? A. Well, I'm not sure I know which reference—

* * *

Q. The article is discussing the Ballot Law proceedings,

the [162] Ballot Law Commission proceedings, in large part, is it not — the results of those proceedings? A. Yes. Part of the references are to matter which was before the Ballot Law Commission.

Q. Now, Mr. Langley, I'm trying to get from you testimony that I think would be helpful to the jury in the area of journalism. I want you to assume that that Ballot Law Commission proceedings took place the first week in August. Why should it be recounted again in this column a month later, three days before a primary? What's the news reason for it? A. Perhaps Pearson felt he had some new evidence or new information that — or perhaps he only recently caught up with the facts of the Ballot Law hearing. He writes a national column. This column of his is not printed only in New Hampshire but all over the country, and this information might be of interest in other states, just as other parts of this column are about other parts of the country than New Hampshire but still are of interest to New Hampshire people.

Q. Is there any particular reason why it would be of interest three days before the primary rather than back — I recall asking quite a little while ago in your testimony, why did [163] it have to be printed before the primary to be of interest, and you said it wouldn't be of interest after the primary. A. In New Hampshire it happened to be quite pertinent at the time it was printed.

Q. Sir? I'm sorry. A. In New Hampshire it happened to be quite pertinent at the time if was printed, but to the large majority of the subscribers to this column that date is unimportant.

Q. Why is it newsworthy in New Hampshire a month after the event? A. He may have felt that he had additional information or — but he doesn't write primarily to New Hampshire. He writes for the country. I don't

know how many papers he sells his column to, but it's a great many.

Mr. Reynolds: Your Honor, I'm going to object to the question ....

* * *

[164] The Court: Is it your position, Mr. Brown, that he would know why Mr. Pearson wrote the article?

Mr. Brown: It's my position, your Honor, that in the field of journalism there is a time after which news is no longer [165] news unless it is being republished for an ulterior purpose, and I think that generally people in the newspaper game recognize that and recognize that something a week old is stale as news; and when it is re-published, when it is re-published three days before a primary, I think that there may be some additional reason for it and that's why I'm inquiring of this gentleman as to the journalistic aspects of it. I'm sure Mr. Pearson will have his version of why this timing actually resulted.

* * *

[166] Q. [By Mr. Brown] Mr. Langley, just to sort of see if I can straighten out what I'm trying to get at — I'm trying not to waste time — can you tell me whether the two photocopy pages that I just gave you are photocopies of the Concord Monitor, reporting on its first page under date of August 4 the Ballot Law proceedings in which the Herbert Hill forces attempted to get rid of straw candidates?

* * *

A. That's the first page of the Monitor for that date. There is a story headed "Ballot Board Studies Plea to Oust Trio".

Q. Is it a full, factual report of the proceedings, Mr. Langley? A. Well, without reading it, I couldn't tell you.

* * *

[167] And then your following day, on the 5th of August,

1960, you reported the results, did you? A. We have a story headed "Barred From Ballot, Pair Asks Refund", in the paper of August 5, 1960....

* * *

Mr. Brown: I offer the two photocopies from the two issues of the Monitor.

* * *

The Court: Plaintiff's 6.
[So marked]

* * *

The Court: Plaintiff's 7.

* * *

[168] Q. [By Mr. Brown] Now, Mr. Langley, those two articles are [169] straightaway news reporting of what happened at the Ballot Law Commission hearings, isn't that right? A. Yes.

Q. They cover the fact that Mr. Millimet, counsel for Hill, was unsuccessful in his attempt to demonstrate that Roy was connected with the others as straws; correct? A. Yes.

Q. And those articles also give the public the information as to the police record of Sullivan and — the two that were actually declared straws; correct? A. Right.

* * *

Q. Well, the thing that I don't quite understand, and I'd like your help on it if you can be helpful, is what is the journalism reason for repeating this stale news on September 10 after it's been adequately reported the first week in August?

* * *

[170] The Witness: The Pearson column is not a news column.

Q. [By Mr. Brown] Well, what is it? A. Well, it's primarily a column of editorial comment which contains

some information. That's why we printed it on the editorial page.

Q. Mr. Langley, as a newsman and as a fellow who has been reasonably active in politics, you know as a fact, don't you, sir, that publishing that Pearson piece three days before that primary would necessarily hurt Roy's political chances in the campaign; correct? A. I don't know that, no.

* * *

[174] Q. [By Mr. Brown] Well, let me ask you this, Mr. Langley: You're older than I am, been around longer; can you be at all helpful as to what the term "bootlegger" means in the connotation it was used in this article? A. Mr. Pearson used it. You'll have to ask him.

Q. You don't — you have no knowledge of what the term "bootlegger" in ordinary adaptation means? A. I have a concept of it, but this is Mr. Pearson speaking, not me.

Q. Well, this was circulated in New Hampshire. You're a man [175] who uses words to make your living. What does the word mean as New Hampshire readers of your paper would interpret it — your definition? A. My definition of "bootlegger" would be someone who distributes illicit liquor.

Q. In violation of the law? A. I used the word "illicit".

* * *

[183] Q. [By Mr. Brown] Mr. Langley, isn't it the fact — isn't it the fact that the writer of this piece intended the readers to gain the impression that Roy was endeavoring to get Sullivan into this campaign as a straw as a favor to his friend Styles Bridges? Isn't that actually what the man is actually attempting to convey as an insinuation? Isn't that what he is intending to convey, sir? A. I'm trying to answer your question, but what I read here is, "But the warden denied another report . . ."

Q. Yes. This is — as a matter of fact, this is a journalis-

tic gimmick, isn't it sir? You make a claim on a telephone call, the fellow says it isn't so, and then you merely state you made the claim and he denied it, and that gets it into the newspaper.

Mr. Reynolds: I object, your Honor.

[184] Q. Isn't that a gimmick to get Bridges' name into this piece? A. A reporter naturally asks a lot of questions. Some questions he gets the answer "No" to; others he gets other answers to. He reports what he gets.

Q. Why should Styles Bridges' name be in this column if Pearson threw the claim and the man he threw it to said, "No, it didn't happen"? Why should Pearson be mentioning Styles Bridge's name at all, sir? A. He may have had information that was brought up at the Ballot Law hearing.

Q. In other words, he's suggesting, sir, that in spite of the fact that his informant, Lavellee, says it isn't so, this column suggests that it is so; isn't that the intention of the column? A. It quotes the man as denying it.

Q. But the reason, sir, for putting the name of Styles Bridges in there is to raise the doubt — A. I can't answer for Pearson's reasons for what he writes.

Q. Mr. Langley, you have written all of your life for the understanding of readers. Do you want this jury to believe that you can't be of assistance to them as to whether or not Pearson actually intended his readers to draw the conclusion that I have suggested to you? [185] A. I don't know what he intended.

* * *

Q. [By Mr. Brown] Mr. Langley, let me ask you this: If we bring readers before this Court and jury who say that they read this article and that the article was understood by them to imply, to insinuate, that Roy caused Sullivan to enter this race as a favor to Bridges, would you

say that [186] that is a far-fetched interpretation by readers of this column?

• • •

A. Well, I can conceive that you can bring readers before the Court who might answer differently than that. In other words, I would have to make my judgment on a consensus of readers.

Q. Well, I understand that, Mr. Langley. I'm going to ask you to assume that there will be reliable witnesses brought before the Court who will testify that not only did they get this understanding from this article but that they heard it being discussed by other who got the same [187] impression; and my question to you, sir, is that if readers say, responsible readers say that they understood the article in that sense, as casting the insinuation, raising the suspicion, that Roy caused Sullivan's entry into this race as a favor to Bridges, would you say, in view of the language of the article itself, that that was an unreasonable interpretation of that portion of it?

• • •

A. All I would admit if that were so was that that was the preponderance of the way they understood the article.

Q. Mr. Langley, the thing I had some difficulty in understanding you on, if that wasn't the intention of the writer, what reason is there for mentioning Bridges' name at all in connection with the telephone call under the circumstances related in the article itself? A. Well, we who write know only too well how sometimes we don't create the impression we're trying to create. In other [188] words, we don't express ourselves too well so that we're understood. That's why I say you have to go back to the writer and explore how his mind is working to learn exactly what his purpose was, what he was trying to elucidate, what he was trying to get across to his audience. Now, I've had that experience repeatedly.

Q. And the suggestion that "That sly old Republican" — Bridges — while he disclaims any connection with the situation, "appears plased over the muddying of Democratic waters" — adding that to this, you can't be helpful as to whether the writer intended the readers to get the impression that Roy was acting for Bridges in this matter? Are you serious, sir, that you're unable to be helpful to us on that score? A. I don't know what another man is trying to say, what he's trying to — what impression he's trying to convey. You're talking about an impression here that the readers may get from reading something.

Q. All right. Let me ask you something else — A. If he states a fact, I can understand that.

Q. Well, he stated a fact. He stated that Roy was a former small-time bootlegger. That's a statement of fact, isn't it? [189] A. That's right.

Q. Would the publication of that tend to injure the man's reputation concerning whom it is stated? A. It might.

• • •

Q. Did anybody on the staff of the Monitor, Mr. Langley, consider this column from the point of view that it probably would injure the reputation of Roy, if you know? A. I don't think they considered it from that point of view. They considered it from the point of view of whether the facts were accurate.

Q. Whether what? A. Whether the facts were accurate.

Q. I thought you told us earlier that your people did not attempt to make that determination but that you relied on Pearson? [190] A. Well, what I mean by that, they trusted the author and considered those facts as stated in the article accurate.

Q. They assumed the correctness of Pearson's writing? A. They assumed the correctness in view of the person who was writing the column.

Q. Does the Monitor maintain any file of information with regard to Mr. Roy? A. Not to my knowledge.

Q. No segregated information filed away? A. We're too small a paper to have a big morgue, as they call them.

* * *

[192] Wednesday, December 7, 1966 10:10 a.m.

* * *

Q. [By Mr. Brown] Mr. Langley, I want to ask you if you perhaps can identify some photocopies of sheets from other newspapers, and I show you one here, a single sheet, in the lower left hand column of which there is a heading: "Looking back in the Herald", and I'd like to ask if you can tell from looking at it whether this is a photocopy of the Portsmouth, New Hampshire Herald? A. This is presumably Page 13 of the Portsmouth Herald, Portsmouth, Herald, Portsmouth, New Hampshire, September 10, 1960.

Q. And on that photocopy, at the top left hand side, with a two-column head, the Drew Pearson piece, under a heading of "Snafu in New Hampshire Politics", appears? A. Right.

Q. Can you just briefly, just by examination — does it appear to be a publication based upon the same column that we've been talking about in your own paper? A. My eyes won't take that small print.

Mr. Reynolds: I'd like to object. May I approach the bench a moment, please?

[193] The Court: Very well.

At the Bench

Mr. Reynolds: I think we're entitled to an offer of proof as to the purpose of Brother Brown's introducing the Portsmouth Herald of September 10 when the issue is the defendants' publication in this case, ap-

parently, of the Pearson article. What bearing does it have on this case — or any other newspaper, for that matter — because the defendants here are NANA and the Monitor.

* * *

[203] Mr. Brown: If it please the Court, may I make an offer of proof?

The Court: You may proceed.

Mr. Brown: I offer to prove through this witness that the document I've had him identify is a photocopy of the Portsmouth Herald, Page 13, of the date of September 10, 1960, and that on that page there appears a version of the Drew Pearson column of which we complain, and that that version, by inspection and comparison to what [204] was published in the Concord Monitor, has obviously been edited to eliminate certain defamatory material that was in the column as presented to the newspaper. And I propose also to offer through this same witness the publication of the Claremont paper and the Laconia Citizen, in which the same situation will appear, that is, that in those newspapers, on the same date, versions of this same column do appear; and I am offering all three for the purpose — I'm offering them against the defendant NANA, not against the Concord Monitor, for the purpose of establishing in evidence the fact that the column was published as a result of circulation by NANA in these additional newspapers within New Hampshire. Now, is there objection on that basis? And if there is, I want the record to be clear as to what the basis of the objection is. [205] And if the ruling is an exclusionary ruling that's going to require me to bring people from all those newspapers here, I'm going to ask for a ruling that I'm entitled to recover the cost of doing that, regardless of the result,

because I regard this to be dilatory in the extreme, and harrassment, and that it has no other purpose, because it is perfectly obvious from records on file in the state library in Concord that this situation did exist. This isn't any surprise to the defendants. They've known it. It's been pleaded in the writ. It's been referred to in opening, and it is the fact.

Mr. Millimet: We object to proving the editing of these columns in this manner, and therefore we object to the introduction of these copies through this witness for reasons previously stated on the record. There are constitutional [206] questions here that depend upon reasons that existed in the minds of the editors of each of those papers for what they did; and those reasons, whatever they may be, are not admissible against either NANA or the Concord Monitor on any issue involved in the constitutional tests for libel, because we have to know what the editors of those papers thought about this column when they printed it, what they knew about it.

Mr. Brown: It sounds persuasive. I'd like to see some legal authority for the position because I think it's completely without foundation. I never heard such a ridiculous view of the necessity for proof. May we have some ruling so we can get on with the trial?

Mr. Millimet: It's a necessary corollary of the New York Times rule. If you were allowed to prove that John Jones, who [207] had special knowledge, did not print it, and then argue that therefore Joe Smith should have done it by simply introducing what John Jones did, there would be no way for a defendant to protect himself. This is not an ordinary way, your Honor, of proving a copy of a paper in any event, to bring it in through another witness who publishes newspapers.

Mr. Reynolds: About the other arrangement, Stanley offers this on NANA, that among NANA's customers in New Hampshire for the Pearson column were these papers, and he's suggesting that he wants to show these people subscribed to NANA —

Mr. Brown: That is not the principal —

May we have a ruling?

The Court: I will sustain the objection on the grounds that it's offered. I will overrule the objection if it is offered solely to show the distribution [208] of the column in New Hampshire.

Mr. Brown: That is what I have stated as the purpose for the offer, and I'm offering it only against NANA.

The Court: To show distribution?

Mr. Brown: Yes. The fact it was published. The fact they subscribe is of no significance.

The Court: I will overrule the objection and admit it for the purpose of showing its publication.

* * *

[209] The Court: For that purpose it may be marked Plaintiff's Exhibit 8.

Your exception may be noted, Mr. Reynolds.

[210] Mr. Brown: So that the record may be clear, your Honor, we are not offering it as evidence against the defendant Monitor-Patriot Company, which is the other named defendant.

The Court: Mr. Reynolds, did you want to be heard?

Mr. Reynolds: Your Honor, I'm perfectly happy to have these marked for identification if Mr. Brown is offering the fact that the Portsmouth Herald and maybe another newspaper or two received and published Drew Pearson's column, without the column itself necessarily going to the jury.

Mr. Brown: I make no such agreement, your Honor.

The Court: I think we will mark it Plaintiff's Exhibit 8 for the limited purpose stated.

[So marked]

Q. [By Mr. Brown] Now, Mr. Langley, I have given you another copy, photocopy. Can you tell from the masthead that appears on that photocopy what newspaper that's a copy of? [211] A. This appears to be a copy of the Claremont Daily Eagle for the date of Saturday, September 10, 1960, and this is Page 4, I think.

Q. And on that page, again, is the Pearson column in there under a by-line, and then it says, "Pearson Hits Hill's Opposition"? A. Yes, sir.

Mr. Brown: ...

* * * your Honor, we offer this only against the defendant, North American Newspaper Alliance, Inc., and not against the Concord Monitor; and we offer it as proof of publication and circulation of the article in the Claremont Eagle.

* * *

The Court: Plaintiff's Exhibit 9....

* * *

[212] Q. [By Mr. Brown] Now, Mr. Langley, I have you two photocopy pages from another publication. Can you tell, from the reproduction of the masthead from what newspaper that is a photocopy? A. It appears to be a photocopy of the Laconia Evening Citizen for Saturday, September 10, 1960, for the first page.

* * *

Q. On the first page of the Laconia Citizen that I show you, does a head appear: "Washington Merry-Go-Round. Congressional Deadheads Fly Home Free. Democratic Victory Threatens G.O.P. Stronghold. Prisoner Freed From Workhouse [213] To File For U. S. Senate"? Is that the head? A. Yes, sir.

Mr. Brown: We offer again, your Honor, only against

the defendant North American Newspaper Alliance and not against the Monitor-Patriot Company, the two pages of photocopy from the Laconia Citizen for the purpose of proving publication in that paper of the article in dispute here.

Your Honor, may the record show that as documents are being offered, under our practice, adverse counsel are being afforded an opportunity to examine them before they are received in evidence, as is our usual practice? I don't think that appears in our records as the method by which we try cases here in the state.

* * *

[214] The Court: For the same limited purpose it may be marked Plaintiff's Exhibit 10.

* * *

Q. [By Mr. Brown] Now, Mr. Langley, I'm going back to general matters not limited to the claims against the North American Newspaper Alliance.

Mr. Langley, under the arrangement that your paper had with the Pearson column sponsors, or whatever you call them, the distribution group, was there any contractual requirement that if you printed a column, you printed it as it was supplied to you, or were you free to change material in the column? What was that situation?

* * *

A. We had no contract with the syndicate, at that time called a Newspaper Alliance. The only agreement we had with them was as to the price.

* * *

[215] [Q.] Mr. Langley, were you free — were you free to put another paragraph into a Pearson column saying, for example, that Alphonse Roy was a house robber? Could you add that to Pearson's column and run it under his by-line? A. We certainly wouldn't add it without making a notation that is was an editorial note by the newspaper.

Q. That's what I'm getting at. A. In other words, we wouldn't change the column under the pretext that it was his column.

* * *

[Q.] You just indicated if you were going to put anything in of your own, you would bracket it or set it off as being an editorial comment of your own? A. We would add in brackets, presumably, if we wanted to add any comment, what we would call an editorial note; and it would be in brackets, indicating that it was put in by the [216] newspaper.

Q. And not by Mr. Pearson? A. And it was not a part of the original column.

Q. On the other side of that same situation, Mr. Langley, as you understood the situation, you told us yesterday that you would edit to cut the article down to fit space; correct? A. That we did quite often.

Q. Were you at liberty to print a portion only and leave some of the material out of the article as presented to you? A. We were free to do that, yes.

* * *

Q. [By Mr. Brown] What I'm trying to get at, Mr. Langley, one way that you make a tall man fit the bed is to cut his feet off; that is, cutting from the bottom up? A. Yes.

Q. There was no requirement in any contractual arrangement [217] that you had that you had to use from the top of the column down? You could take a paragraph out of the front of the article, the middle of the article — anywhere that you saw fit? A. If we shortened it, it might be at any point. We would read the whole thing and presumably would throw out what to us seemed to be of least interest to the public.

Q. And does it also follow, Mr. Langley, that if there were any material in the column that you felt should not

be published because of its being defamatory that you had the right or the authority to delete that? A. We would have deleted, if we did that, the entire section. In other words, we wouldn't attempt to edit just to make him say something or say less than he actually said about a given subject.

Q. You wouldn't attempt to clean it up and still run the article? A. We wouldn't attempt to put words in his mouth by elimination or addition.

Q. All right. Now, let me ask you, sir, after the article was published, the article we're talking about, did the Monitor, on its own behalf, enter into any investigation at all as to whether what was said about Roy was true or false? [218] A. No.

Q. And you didn't previous to publishing? You've told us you assumed Pearson knew what he was writing? A. That's right.

* * *

[220] Mr. Brown: Thank you, very much, Mr. Langley.

Mr. Reynolds: We have no questions of Mr. Langley at this time, your Honor. We might call him when we put on our defense subsequently.

The Court: You may step down.

* * *

[1] TESTIMONY OF JOSEPH A. MILLIMET

* * *

Direct Examination

[By Mr. Brown]

* * *

[5] Q. One other thing, Mr. Millimet. Have you ever been elected to public office here in New Hampshire? A. Once, I think.

Q. And to what office and when? A. I was elected a delegate to the constitutional convention to revise the constitution, and I think it was in 1948. I think.

Q. My question, Mr. Millimet, was whether you have in your career been a candidate for elective office other than the Con-Con in 1948? A. Yes. I was a candidate twice, on two other occasions. [6] I was a candidate for the nomination for the United States Senate in the Democratic primary in 1948, and I was a candidate for election to the Con-Con in Ward 1 in Manchester in 1964 or '5—I forget which year it was; and I was defeated on both occasions.

Q. The constitutional convention delegate situations were non-partisan, really? A. No. I think not. I think they were partisan. As a matter of fact, I think that's why I was defeated in Ward 1, because, you may recall, I had been chairman of the commission to revise the constitution in its recent revision in the last convention, but it was a Republican ward and I was well known as a Democrat.

Q. So if those were partisan elections, you ran for public office on three occasions, and on all three occasions as a Democrat? A. That's correct.

Q. Now, your only successful run was your 1948 constitutional convention one? A. Yes, and that wasn't much of a political success because then I lived in Ward 6, which was a Democratic ward, and the nomination was pretty much tantamount to election, I'd say.

[7] You have or have not held public appointive offices, as distinguished from elective offices? A. Oh, I guess I've been—I don't know about "office". I've done various things as a lawyer for the public. I suppose you could say that—well, I am at the present time a commissioner representing the State of New Hampshire to a body which is known as "The Commission on Uniform State Laws",

which is a lawyer's problem, where we meet once a year to consider drafting and securing the adoption of laws throughout the United States which will be uniform to avoid the conflict between the laws of different states. I think that's about the only thing I can think of that I've been appointed to.

Q. Well, Mr. Millimet, haven't you served as the Governor's legislative counsel by personal appointment of the Governor? A. Oh, yes. I say, that's a lawyer's—

Q. And aren't you counsel for the Sweepstakes Commission? A. Yes. These are lawyer's things. That's what I said. The only thing that I can recall that I've ever been appointed to were jobs as a lawyer. I don't know whether you call them public office or not. That's what I intended to say.

Q. All right. Within the Democrat party, have you at any time held positions as a party official? [8] A. Well, for some years I was the treasurer of the Democratic City Committee here in Manchester. I don't recall just when this was. It was a relatively long time ago. It was when John Hartnett was the chairman. I have been, probably, on the State Advisory Committee off and on over the years. I have on several occasions been the chairman of the Platform Committee when we have our bi-annual sessions to draft our platform for the election. And that reminds me—I may have been—I probably have been elected a delegate from time to time to the state convention of the Democratic party. I don't know if that's elective office.

I guess it is. And I don't remember when it was.

Q. Mr. Millimet, additionally to what you've told us, the fact of the matter is that during the period up to—Your partner, who died suddenly, Murray Devine, was, during the '50's and '60's, extremely active in the upper echelons of the Democrat party? A. My partner?

Q. Yes. Murray Devine. A. Oh, yes. Murray was state chairman for quite a number of years. No question. I don't know the dates. But I think his terms were, oh, probably the same as—started probably in '57 or '58 and ran up to his death in 1965. He died [9] January 5, I think, 1965, at the age of 47.

Q. One other general matter I just want to mention or ask you about—while you were a student at Dartmouth, you were interested in and active in journalism; is that correct? A. Well, I was one of the editors of the Daily Dartmouth, yes.

Q. And you have since then maintained some interest in the field of journalism because of your activities and interest at that time? A. Well, I'm just a newspaper reader, I'd say. I haven't ever participated in any journalistic activities other than that.

Q. All right, Mr. Millimet.

The Court in this action required that the defendant advise the plaintiff of the names and addresses of the person or persons furnishing information for use in the article complained of—furnishing that information to Drew Pearson's people. Who were the sources that were reported in response to that order; do you recall? A. I think that the names furnished were "Joseph Scott"—

Q. And Mr. Scott is the gentleman sitting here in this court right in back of Mr. Pearson's personal counsel? A. Well, he's sitting there with the glasses at the back of the courtroom.

Q. Who else is identified as being a source of the information? A. Ralph Lavallee and myself.

Q. And yourself? A. That's right.

Q. Is that correct? A. Those are the names that were given to you, yes.

Q. And, Mr. Millimet, the order was that all sources be

revealed. Were there any others or were those three the total?

* * *

A. I don't recall the scope of the order, and I didn't understand that it was that all sources be revealed, because I think that Mr. Pearson got information from his own staff which I didn't have any knowledge about.

Q. Well, let me ask you this, then:—I just want to be sure I understand the situation—Aside from employed members of his staff, as you understand it, were the sources of information in this column only yourself, Scott and Lavallee? A. That was the only source that I knew about when we furnished you those names.

Q. I'm asking you presently, are those the only sources, or were there other sources who were not identified at the [11] time these names were given?

Mr. Reynolds: I'm going to object, your Honor.

* * *

[12] The Court: I understand you are asking this witness to give information that he gained after he became counsel for the defendant. If I understand Mr. Reynolds, that is what he is objecting to, and I will sustain the objection and note your [13) exception.

Mr. Brown: Exception. Thank you, your Honor.

Q. [By Mr. Brown] Can I find out, Mr. Millimet, from you, whether it is your present—before I go into what you gave—I want to know whether you say at this point, as a witness, not as a lawyer—as a witness—do you say there were other persons supplying the information to Pearson beyond the three that you have identified previously under the Court's order? A. As a witness, I have no such information.

Q. You don't know one way or the other? A. No such information.

Q. Thank you. Now, Mr. Millimet, your contract with

Mr. Pearson with regard to the subject matter of the article we're concerned with was what kind of contract? A. I was called on the telephone from somewhere outside the state. I assume from Washington, D. C.

Q. By whom? A. By Drew Pearson.

Q. Personally? A. Well, he said he was Drew Pearson. I never met him, but—

Q. Well, I just want to be sure, Mr. Millimet, it wasn't someone on his staff who identified himself to you as being Drew [14] Pearson himself. A. I can't remember exactly how it came up, but I think he started out and said, "This is Drew Pearson." So I assumed it was.

Q. I'd like to ask you, Mr. Millimet, when—what was the date of that telephone conversation?

* * *

A. Well, I can answer the question without the data, and I can tell you that to the best of my memory, from studying the data which I had in my possession as counsel, the call probably occurred sometime after September 1, 1960 and prior to September 8, 1960.

[15] Q. [At the blackboard] So that Millimet's testimony is that Pearson called Millimet sometime between September 1 and—? A. Well, put down September 8. I can't be sure.

Q. —and September 8. And, Mr. Millimet, do I understand correctly that this was the sole and only contact between you and Mr. Pearson with regard to the subject matter of this article? A. Prior to my retention as counsel in the case, that is correct.

Q. All right. Let me ask you quite specifically, sir, did you have any conversation with Pearson at all with regard to whether Alphonse Roy was or had been a bootlegger? A. To my recollection, I did not.

Q. And had you, individually, any information as of the

time of that telephone call that he had been a bootlegger? A. I did not.

Q. And it is your testimony that whether he had been a bootlegger or not was, to the best of your recollection, not discussed at all between you and Mr. Pearson? A. That's the best of my recollection.

Q. Now, Mr. Millimet, in the article that was the basis of this action, there is a— A. Mr. Reynolds is going to give me a copy of the article.

[16] Q. In the article there is reference and discussion of a telephone call from Mr. Roy to Ralph Lavallee. Let me ask you, Mr. Millimet, did you in any wise discuss with Mr. Pearson anything at all about that telephone call —whether it took place, what the purpose and content, and so forth, of the telephone call was? A. To the best of my recollection, I did not.

Q. And why are you able to be fairly precise that you did not discuss that? A. Because I don't think I knew anything about that telephone call until after this litigation was brought to my attention; and I was surprised to learn about it and somewhat chagrined, I might say, to learn about it.

Q. So that your testimony is, sir, that to your recollection you didn't know about the telephone call until after the article had been published? A. Long after it had been published.

Q. So that you could not have been the source of any information about that telephone call? A. No, sir, I could not.

Q. You have previously given a deposition under oath concerning your contact with Mr. Pearson in connection with this action? A. Just a couple of weeks ago, as I recall.

[17] Q. Is there anything in your testimony under oath in the deposition, Mr. Millimet, which you know to be in error and you want to change? A. There certainly is.

Q. What is that? A. Somebody asked me if the state committee had taken any position in this primary, and I said, "No". The state committee never does that.

Q. You said in your deposition that the Democratic state organization does not take a position preferring one candidate in the primary over another, that that would be improper and the state committee did not do it in this instance? That's what the testimony was? A. No, that isn't it. Here is what the testimony was. I'll read it. Question 63: "Prior to the primary and the nomination of Hill, had the state committee taken any position as to which candidate it preferred for this particular nomination?" And I said, "No. The state committee never does that." And I was wrong. I was not on the state committee—

Q. Your partner, Mr. Murray Devine, was? A. He was the chairman.

Q. And you were the campaign manager for Hill? [18] A. I certainly was.

Q. And the day after they took this vote, you started the Hill proceedings in the Ballot Law Commission? A. I don't know about that. I may have started it before. I don't know.

* * *

The Witness: Your Honor, I would like to have an opportunity to explain my forgetting this incident that Mr. Brown asked me about before recess.

The Court: You may explain.

The Witness: I started to say before recess that I was not a member of the state committee at the time, Mr. Brown, and I was not present at any meeting at which the action you refer to was taken. And before I gave my deposition, being aware of the problem of being a witness and also being of [19] counsel in the case, I did not review anything in my possession that came into my possession

as counsel but only reviewed what I had in my possession prior to the time that Mr. Pearson called me on the telephone in early September, 1960; and I had nothing in my possession at that time which pertained to the action of the committee to which you refer, and I think that's why I have forgotten it.

Q. [Mr. Brown] You have completed your explanation? A. There is one more thing. I think it was inflicted in the answer to the question you asked me before. It was an unusual thing for the state committee to take a position in the primary. I think you brought that out yourself, and I had forgotten it.

Q. As a matter of fact, Mr. Millimet, this is the only time, up to that point in modern history, that the Democrat organization has attempted to force somebody out of a primary in order for the preferred candidate to win; correct? A. This—I can't answer the question in the manner in which you give it. This, I think, is correct, that this is the [20] only time that straw candidates for major office were ever petitioned against.

Q. That isn't what I intended to ask in my question, sir. I'm talking about the action of the state committee the day or two days before you started the Ballot Law Commisison proceedings. Their action was actually to publicly state that the committee apparatus wanted Hill and did not want Roy; isn't that right? A. What the state committee did is a matter of wide report. You probably have it right there in your hand. What it was for I think speaks for itself. As far as the committee ever taking a position in a primary before or since, I — my memory isn't so good that I can tell that. I don't think it's been done since, but I don't know what happened before.

Q. Is there any question, Mr. Millimet, but that Alphonse Roy had as much right to run in the primary for the Democrat nomination for U. S. Senate in 1960 as Her-

bert Hill had? Is there any question about it? A. No question whatsoever. And I would like to say that in the proceedings before the Ballot Law Commission, which I conducted as counsel, it was stated that there was no question and no attempt was ever made to have Alphonse Roy stricken from the ballot by the petition before the Ballot [21] Law Commission or, so far as I know, by the state Democratic committee.

Q. Alphonse Roy at that time, sir, was a prominent Democrat who had uniformly been favorably received in his own party at the polls up to that point, isn't that correct? A. I don't think so.

Q. All right. He had been elected to the United States Congress? A. Well, you know that's a long and complicated story about which there are many versions. He had been seated in the Congress back in 1938, I guess. I have been told. I never looked this up. He had been seated, I was told, on the last day of the session; and the election returns — I checked this, Mr. Brown, before I came — the election returns recorded at the Secretary of State's office here in the State of New Hampshire indicated he was not elected. But you know what this is all about. Your office handled it.

Q. It may be that I know more accurately than you. A. I'm sure you have a file on it.

Q. I'd like, Mr. Millimet, to ask you to answer my questions on the basis of what you know rather than on conjecture. Now, as a matter of fact, sir, Alphonse Roy was elected to the Congress of the United States and seated in the Congress of the United States; isn't that correct? Don't you know [22] that to be so? A. Mr. Brown, if you want me to confine myself to what I know from personal investigation, of course I can't tell you. All I know is what I've learned in my daily life. And I have been told that many times, and I assume that it's true, that he was

seated, as I said before, at the end of the session after a long, bitter dispute between him and Jenks, which your office handled. I wasn't even here at the time. I was in law school.

Q. And that's all you know about it, is that right? A. That's all I know, except what's printed in the Red Book, where it shows that Jenks had the majority of the votes; and I don't think it was ever changed in the Secretary of State's records.

Mr. Brown: I move that be stricken, since the witness has said he doesn't know, and I don't want the record any more confused than necessary.

[No ruling]

Q. [By Mr. Brown] Mr. Millimet, were you aware in 1960 that Mr. Roy had been elected two times and had served two two-year terms as a member of the Governor's Council? Any question about that? [23] A. I don't know whether I knew he had been elected twice. I knew he had served on the Governor's Council.

Q. And you were personally aware of the fact that he had been appointed United States Marshal for New Hampshire and had been reappointed in that position and had served for two full terms in that position? You knew that? A. Well, I knew he was United States Marshal. I honestly didn't think — I didn't remember it was two full terms. I had somewhere in the back of my mind one was an unexpired term. But I knew he had been a United States Marshal.

* * *

[24] Q. [By Mr. Brown] Mr. Millimet, in 1960, had Herbert Hill ever won a primary? A. I don't know — wait a minute. Yes. Yes. Yes. Sure he had. He had been the nominee for Governor on the Democratic ticket in 1948, so he must have won a primary. I don't know whether there was a contest or not. I can't remember whether there was a contest.

Q. And he was defeated by Governor Adams? A. By what we always thought was a small margin. We thought he ran a very good campaign.

Q. He was defeated by Governor Adams? A. He was defeated by 11,000 votes, as I remember it.

* * *

[25] Q. And from 1948, sir, until 1960, did Herbert Hill aspire again to any public office? A. I don't know.

* * *

[26] Q. [By Mr. Brown] What reason — what reason, Mr. Millimet, was there that justified the state committee in your party to take sides and publicly state that one of the two candidates was not qualified and the other was? What basis is there for that type of action by that political organization in the primary?

* * *

A. Well, it will be a long explanation, your Honor, and it starts out with the fact that the nominee for the Presidency of the United States in 1960 was John Fitzgerald Kennedy, and the Democratic organization in New Hampshire was devoted to Mr. Kennedy. Many of us regarded Mr. Kennedy as [27] one of the great men of our lives. We went to California to the presidential convention, and we worked hard for Mr. Kennedy's nomination. On our return we started to work hard for his election in New Hampshire. If you know anything about the history of the Democratic party prior to 1960, you know that for a long period of time, as far as my memory goes back —

Q. To 1945 — '39? A. No — well, as an active Democrat, yes, sir; but certainly since World War II the Democratic party had had great difficulty in putting into the field a slate of candidates who would appeal to the independent voter as well as to the registered Democrat. We thought in 1960 that we owed it to Mr. Kennedy, for once in our lives, to field a slate of candidates that would as-

sist him in his candidacy; and I think it's fair to say that all of us who came back from that convention came back determined to do that. And we started immediately. In fact, I started on the plane coming back. I rode all the way back on the plane with Senator Muskie from Maine and talked with him about it, about how the Democrats had finally, in the State of Maine, succeeded in winning an election, and we became convinced that the only way we could do it, the only way we could help [28] Mr. Kennedy, was to have a good slate of candidates for major office right across the board, the best we could get.

* * *

[30] Q. Go ahead. A. As I say, we were determined to put a slate of candidates [31] before the people of New Hampshire which could attract the independent voter, because we knew that New Hampshire was a state where the registration was heavily Republican, and we knew we had to attract the independent voter to carry the state. Now, our first problem was to get candidates to run, not to keep people from running. We had had trouble over the years in getting good candidates to run. And the first thing we did, we started, as I said before the recess, we started to review what had happened in the recent past and looking for people who would make good candidates. My recollection is — I might be wrong, but I don't think Mr. Hill, for example, was in California. I don't remember. Maybe he was. But in any event, there were a number of us who thought that Mr. Hill's campaign in 1948 had been an excellent one and he'd been a good candidate. So one of the things we did was we tried to persuade Mr. Hill to be one of the candidates. We already had a candidate for Governor in Bernie Boutin, who had made an excellent race the previous election against Wesley Powell, and we were looking for a candidate for the Senate and for the First Congressional District. We never

did too well in the Second District, as you know. We spent a good deal of time talking about it and finally persuaded Mr. Hill to run. [32] We asked him to run. He wasn't a volunteer. We asked him to run for the reasons I've given, so that we would have a good ticket and we would have a ticket which would appeal to the broad spectrum of the voters; and we agreed that if he did run, we would help him. I'm sure that you know as well as I do that it's sometimes a lonely thing running for public office, and if you don't have help, it's a hard thing and something that should not be wished upon you. When you go to somebody and you ask them to run, you should agree to help them, and we did agree to help Mr. Hill.

Q. That you'd use the state apparatus to help him against other primary opponents? A. Nobody talked about it in those terms at all. I'll tell you exactly what was agreed. I agreed to be his campaign manager, personally, although I was very busy at the time and shouldn't have gotten involved in it because I was overworked; but I did that because I felt it was important for him to have all the help he could get. And we all agreed —

Q. Was there any agreement, Mr. Millimet, that you were going to take the state organization and turn it against Mr. Hill's opponents in order to help Mr. Hill in the primary? A. Not the slightest. When this was going on, Mr. Hill didn't [33] have any opponents. We didn't have any candidates for the United States Senate at that time. There wasn't any problem. Mr. Roy, for example, had announced that he was going to run for Congress in the First District. He hadn't given any indication he was going to run for the Senate, and so we never thought Mr. Hill was going to have any opponent. That wasn't what I was offering to help Mr. Hill with, in the primary; I was offering to help Mr. Hill in the election against Senator Bridges, because, as you know, Senator

Bridges was a very formidable opponent, and all the help anybody could get they needed against him; and that's what we were talking about in the case of Mr. Hill.

* * *

[35] A. [Continuing] Well, to make it as brief as possible, we persuaded Mr. Hill to run. We had Mr. Boutin as a candidate for Governor, both of whom we thought were excellent candidates. The ticket was headed by Mr. Kennedy, and we wanted a candidate for the First District. I can't recall at this time, Mr. Brown, whether I participated in that in any way. I rather doubt that I did. I know just from being around the party at the time that many people, and probably including my late partner, Murray Devine, thought that Romeo Champagne would be a good candidate in the First District. I cannot recall whether at the time this was discussed Mr. Roy had announced as a candidate for the First District or not. I'm reasonably sure that if it was discussed, we preferred Mr. Champagne over Mr. Roy, but there was no discussion at any time prior to the time when it occurred, there was never any discussion about the committee using its position to do anything [36] against anybody in the primary. There was never, to my recollection, any discussion of that at all, because I would not know all that was going on in the state committee, not being a member of it; but to the extent that I talked with my partner about it, I never heard it discussed, because we never thought there was going to be a problem. Now, when the events happened out of which the Ballot Law proceedings occurred, this just shook up everybody in the party. Here we were working to put a responsible field of candidates before the people of New Hampshire, and all of a sudden, on the last day for the filing of candidates for the United States Senate, there are three people file who, to the knowledge of many, could only bring disrepute on to the party and who could only

jeopardize the effective operation of the primary in a fair contest. My reaction to that as a person who had promised to help Herb Hill in his campaign against Styles Bridges was to file the petition before the Ballot Law Commission to seek to have these three candidates stricken from the ballot as straw candidates. The state committee's reaction to that —

Q. Mr. Millimet—A. This is the end of my answer—the state committee's reaction to that apparently, and to the best of my [37] recollection, was to publicly state that they preferred Herbert Hill and to take an official position in the primary, which, as you, yourself, suggest, may never have occurred before, and I don't think it's occurred since. It was because of the extraordinary circumstances of this last-minute straw candidate filing that we got so upset that I took the action before the Ballot Law Commission in behalf of Herbert Hill and the State Committee did what it did.

Q. The three that you were complaining about did not include Roy? A. It certainly did not.

Q. All right. I want to show you, sir, a newspaper report—A. Excuse me. You said me when you said—when you asked me the question, "you were complaining about", did you mean others or did you mean myself?

Q. You have answered the question. A. Well, I don't want to leave any ambiguity in it, because I've read those newspaper reports and I know what's in them. Before the Ballot Law Commission I made no complaint about Mr. Roy. That's what my answer was intended to be.

Q. You say you made no complaint about Mr. Roy before the Ballot Law Commission? [38] A. I never suggested he was a straw.

Q. That isn't quite the same thing. Did you make any complaint about Roy before the Ballot Law Commission?

* * *

A. I'd like to know what you mean by a complaint, Mr. Brown, and then I'll be glad to give you my answer. [39] Q. Well, I'll waive the question for a moment, but I'll come back to it and I'll demonstrate what I mean, Mr. Millimet. Let me ask you, sir, to read this photocopy of a page from the local newspaper of August 1, 1960. Now, that's before the Ballot Law Commission proceedings started, isn't it? A. No. I think the Ballot Law Commission proceedings started when I filed my petition on the 30th of July, 1960.

* * *

Q. The state committee met and issued a public statement for [40] the newspapers when? A. I don't remember.

* * *

[42] Q. Well, can you advise us, on the basis of what you know, did the state committee take the action that is reported in the first paper that I gave you, and did the state committee issue the statement that is reported? A. The only knowledge I have about it is what is in these papers. I had forgotten all about the state committee doing this, Mr. Brown. I genuinely had forgotten.

Q. Please, Mr. Millimet. My question is quite simple. Do you, or are you or are you not in position to advise the Court and jury whether the action was taken? If you're not, just say so and I'll put it in through someone else. A. Well, I think it was taken. I think what it says in the paper happened.

Mr. Brown: All right. On that basis, I offer [43] the newspaper report of the meeting, and Mr. Reynolds has already seen it.

* * *

The Court: Plaintiff's Exhibit 11.

* * *

[44] Q. If there were 31 days in July, the meeting of

the state committee was the following day, the 31st; correct? A. Yes. Sunday, apparently.

Q. And in that committee action, with your own partner reporting it, the group supporting Hill attacked not three but four candidates, including Roy; correct?

Mr. Reynolds: I object. The characterization "attacked" was apparently a Union Leader expression; . . .

* * *

[45] The Court: Very well. I'll sustain the objection at this time.

Q. [By Mr. Brown] Let me ask you, Mr. Millimet, were you familiar with the fact that Mr. Roy replied in kind to the [46] committee and issued his statement for publication and that it was contemporaneously published? A. I had forgotten that just as much as I had forgotten the fact that the state committee had done it. I did discover it between the time my deposition was taken and the time we started this trial. I went and read the old issues of the paper, just as, apparently, you did; and I found this press release that Mr. Roy had published in the Union Leader.

Q. [At the board] The Ballot Law Committee hearings themselves were convened and held when? A. I think that the hearings started on the 3rd of August, and I have a transcript of the hearings Mr. Reynolds is giving me. It started on the 3rd of August at 1:00 p.m., and I think they—I don't know when they adjourned on that day, but I know they went on the—on the following day also, on the 4th.

Q. And were completed on the second day? A. Yes. . . .

* * *

[47] Q. Is it a copy of the transcript? A. It says it is, right here.

* * *

The Court: Plaintiff's 12 for identification.

* * *

[48] Q. . . . Mr. Millimet, when we look into that transcript, we will find, will we not, that you were attempting to prove at the hearings on the 3rd and 4th of August that Roy was responsible for the filing of the other three candidacies of which you were actually complaining? Isn't that so?

Mr. Reynolds: To this I object, your Honor.

The Court: Would you read the question, please?

[Question read]

The Court: State the ground of your objection.

Mr. Reynolds: Your Honor, I think that the Court should read the transcript of the Ballot Law Commission, number one; and number two, the purpose of the hearings, as set forth in Mr. Millimet's petition, were to prove that Sullivan, Robinson and McCarthy should be stricken from the ballot. And I think the characterization by Mr. Brown of what was going on there in a 56-page transcript is improper.

The Court: Mr. Brown?

Mr. Brown: If it please the Court, I think the [49] witness knows what his approach was at the hearing. It appears in the transcript, and I think the witness can answer the question without going through the transcript page by page. If he cannot, I propose to go through the transcript to get before the Court and jury what that situation was. The position the defendants are taking here is that the effort being made by the people before the Ballot Law Commission was directed solely against Sullivan, Robinson and McCarthy; and it's our position that while they did not attempt to remove Roy, because Roy was obviously not a straw, that this was part of the plan and design to get rid of Roy also, on another basis; and I think I can demonstrate it from the transcript, and I think that this is tied to what eventually happened on September 10th, the last effort to get rid of Roy.

[50] Mr. Reynolds: I'm going to respectfully ask that this Court read, if it would, the transcript during the noon recess before ruling, because if we are going into the whole transcript, it's going to be 56 pages, we might have to go through every single page and it might prolong the trial, and there are certain legal questions involved.

The Court: After lunch I will allow the witness to answer the question. Your exception my be noted, Mr. Reynolds. Mr. Foreman and members of the jury,

* * *

[51] *After Recess*

Q. [By Mr. Brown] Mr. Millimet, to pick up where we left off. I'm going to ask you to take a look at your own statement on Page 56 of Exhibit 12—if I have the right page. I think I have—about the middle of the page, Mr. Millimet, there appears a colloquy between the Attorney General and yourself concerning Mr. Roy. I'd like to ask you to read those references to Mr. Roy and advise the Court and jury whether or not on August 4, when that colloquy took place, you were aware of and were referring to Mr. Roy's public statement replying to the state's Democratic Committee's published statement that he wasn't qualified to run for office.

* * *

[53] A. Well, I can't answer the question satisfactorily because I don't know whether the press statement, the statement in the press, was before the Ballot Law Commission or not. I read this transcript over last week, I guess. I certainly didn't notice that at the time.

Q. Mr. Millimet—

A. Just a minute—

Q. So the jury may understand—

A. I asked you if you wanted me to read it and you told me not [5] to, so I didn't do it.

Q. At the time I didn't think it was necessary. Now I think it is. Mr. Wyman made some comment to you. What did Mr. Wyman, the Attorney General at the time, say that produced this response of yours? A. Mr. Wyman said to me: "I thought Mr. Roy said they"—meaning the alleged straws; they hadn't been declared straws at this time—"I thought Mr. Roy said they would draw from both him and Mr. Hill."

Q. And your reply? A. I replied—my reply as written here is: "In his press statement he said that they were more likely to draw from him as they were from Manchester."

Now, I may have been referring to what's here in the Union Leader or that may be in error. I don't know.

Mr. Brown: I will now accept my Brother Reynolds' suggestion and ask that the statement issued by Mr. Roy be marked in evidence.

[so marked Plaintiff's Exhibit #3]

Mr. Millimet: I'd like to finish my answer, your Honor. I started to say that I think in the transcript itself Mr. Roy said that, that they were more likely to [55] draw from him, and I don't have any recollection of there being a press statement. I'm not sure that's an accurate transcription. There are a number of errors in this transcription, and I just don't know.

Q. [By Mr. Brown] Mr. Millimet, the transcript says—the transcript quotes you as referring to his press statement rather than to his testimony before the Ballot Law Commission? A. I just read it.

Mr. Brown: Thank you.

Now, may the article be marked?

[Already marked Plaintiff's 13]

Mr. Brown: And if it please the Court, on Exhibit 13,

in pen, there is a notation that this is a photocopy of the Wednesday, August 3, 1960, Manchester Union Leader. [58] Q. I think we might get along better if you listen to the question a little more closely. A. I don't see that—I can't tell whether I was referring to any newspaper at all. I would say this—you want me to say and I'm perfectly willing to say it—it's more likely that the Union's statement backs up what's in this transcript than that the Concord Monitor statement does; but whether I had either statement there or not, I don't know. The Union Leader printed Mr. Roy's statement in full, not once but many times. He had ready access to the Union [59] Leader and expressed his opinion openly and very strongly and fully defended himself. I recall that.

Q. Until the 10th of September? A. He defended himself throughout the campaign, as witnessed by several other press releases which you probably have.

* * *

[61] Q. Can you answer the question yes or no? Do you have any such recollection? A. No, I can't answer it yes or no, because I was proceeding as a lawyer before the Ballot Law Commission. I was dealing with a specific statute. I was trying to outline what I thought was necessary to prove to get the other three candidates off the ballot. I was not trying to get Mr. Roy off the ballot. I didn't think it was necessary to show that Mr. Roy, or any other particular person, secured the filing of these men as straws. I simply thought it was necessary to show that they were straws under the statute. [62] I don't recall of saying that Mr. Roy secured their filing. I would have been delighted to prove that he did if I could have. I don't think I knew at the time I was making the opening statement whether I could or I couldn't; but

I do not believe that I ever said Mr. Roy secured the filing of these men as straws.

Q. In that proceeding, sir, you had no evidence whatsoever of that being the case; correct? A. No. That's not correct.

[64] Q. . . . I'm going to back up two steps, Mr. Millimet. Let me start out again. Do you say that there was any [65] evidence at all produced at the Ballot Law Commission hearing indicating that Alphonse Roy had anything at all to do with the procuring of the filing of Sullivan, McCarthy and Robinson who you were then claiming were straws? Yes or no, please. Was there or wasn't there?

* * *

A. If by "evidence" Mr. Brown means that there was direct testimony from somebody that Mr. Roy caused the straws to be filed, so far as my memory goes, the answer is no. Now I'd like to explain it.

The Court: You may explain.

A. The entire record, it seems to me, including the rulings of the Ballot Law Commission, necessarily constituted evidence that the straws were filed in order to draw votes from Mr. Hill to the benefit of Mr. Roy and in that sense, [66] I think the entire transcript is evidence.

Q. Now, Mr. Millimet, let me go back to my other question. Isn't it the fact, sir, that it was your position before that Commission that Roy did procure those filings of straws, and wasn't the effort made to prove it at the hearing?

* * *

Q. There are two questions, Mr. Millimet. Was that your position, number one; was an effort made to prove it, number two. A. I think it was not my position at the Ballot Law hearing because I knew how difficult it would be to prove that sort of thing because you can't get people to testify. I think my position at the Ballot Law Hearings

was that it wasn't necessary to prove that Mr. Roy procured the filing of straws to get rid of them, because I took the position that all we had to show, as I said in my petitions, was that the particular candidates, Sullivan, Robinson and McCarthy, were not bona fide candidates, having filed as straws, not primarily for the purpose of seeking the nomination but [67] primarily for the purpose of drawing votes which otherwise might be cast for the petitioner, meaning for Professor Hill; and I think I plainly steered away from any suggestion that in order to get these men off the ballot we had to prove that Alphonse Roy procured their filing, because I knew how difficult that was, and I wanted them off the ballot. I didn't want Alphonse Roy off the ballot. I wanted them off the ballot.

Q. The second part of my question, sir—the effort was made at that hearing to tie Roy into this; the effort was made to prove that he had something to do with those filings, wasn't it?

* * *

The Witness: Well, I can only say this, your Honor: The testimony concerning Mr. Roy [67] starts on Page 47 and runs through Page 54. . . .

* * *

A. It's my belief that I did not make such an effort but that the Ballot Law Commission did. They were the ones who asked Mr. Roy if he gave some money to these other men to file. I didn't ask him that.

Q. All right. Now I think perhaps you're getting almost toward answering the question I asked you. Was the effort made in that proceeding to prove that Roy had something to do with the filing of these three straws? The answer is yes, isn't it?

* * *

A. The answer is no, as far as I can see.

Q. Thank you. Now, let me ask you—A. I'd like to explain the answer if I could, please.

Q. Well, go ahead. [69] A. I want to explain why I'm saying that.

Q. Go ahead. A. The statute, as I pointed out to the Ballot Law Commission, the statute imposed on the Ballot Law Commission a duty as well as a power—this was a rather unusual statute, and it said—and I read it to them and emphasized it to them—that they had a duty to inquire into whether or not these people were straws. This statute was passed to prevent the destruction of a proper party system. That's the position we took at the—that I took at the Ballot Law proceedings, Professor Hill and I; and I said to the Ballot Law Commission, who were—they were appointed by the previous Republican Governors, and there were two Republicans, I think, out of the three—that it was their duty to inquire and find out whether these men were straws. Now, pursuant to that duty, the Ballot Law Commission asked all of the people who testified there about who gave them the money to file, because the evidence was that they didn't have money, these straw candidates; and they asked Mr. Roy if he gave them the money. Now, I do not believe that in asking those questions the Ballot Law Commission was making an effort to prove that Mr. Roy had procured the filing of those gentlemen as straws. I simply believe that the [70] Ballot Law Commission was doing its duty in an unbiased, non-partisan way. And my recollection is, without reading it all over again right now, that I never asked Mr. Roy if he gave them the money; and therefore I do not believe that the effort was made to prove that Mr. Roy filed the straws.

Q. Is that your total explanation? A. All I can recall at the present time.

Q. Isn't it the fact, Mr. Millimet, that every witness who was called was asked by the Attorney General, or by a

member of the Commission, whether they had had any contact with Roy, whether they got any funds from Roy to file with, whether there was any payment paid to them, or promised to them, from Roy, directly or indirectly, or by friends of Roy? And the answer in every instance, sir, was that there was no such contact and there was no such plan or conspiracy or scheme involving Mr. Roy; isn't that correct, sir, on the record that was made?

Mr. Reynolds: Objection, your Honor. My objection at this point runs to the materiality of this whole line of questioning. Whether or not Louis Wyman or the Commission asked a question of Mr. Roy[71] has nothing to do with the issues in this case, and that is whether the defendants libeled the plaintiff. I want that continuing objection noted, if the Court please.

The Court: For what purpose do you offer it, Mr. Brown?

Mr. Brown: I offer it, your Honor, preliminarily to evidence, and as some evidence, of the malice involved in the September 10 publication; and it is the plaintiff's position that this question of whether Roy had any part of procuring the straw filings was exhaustively gone into at the Ballot Law Commission hearings and that no evidence to support any such suggestion was made available or entered in the record, and the record indicates that the suggestion was nothing that had proof to substantiate it; and when three days before the primary the column of which we [72] complain comes out making the same charge, we say that the fact that it was exhaustively gone into and found not to be substantiated in August is evidence of the reckless disregard for whether it was true or false when the defendants' charge was made in the article of which we complain.

The Court: Well, I would suppose you would be entitled to show the extraneous or extrinsic facts showing

the circumstances under which you claim that the claimed utterances were made by the defendants. For that purpose I will overrule the objection. Your exception may be noted.

[Question read]

A. Well, that must be at least ten questions, your Honor, and I can't answer it.

The Court: Can't you break it up, Mr. Brown?

Q. [By Mr. Brown] Well, Mr. Millimet, let's go right from the record, if you want to do it that way. . . .

* * *

[74] Q. Mr. Millimet, would you be good enough to read the transcript to yourself between Pages 0 and 13 and then advise this jury whether or not the questions trying to tie Roy to Sullivan were totally denied by Sullivan, including financial assistance? A. Well, I can't answer that question that way, Mr. Brown. It isn't possible. I think the jury can read this transcript just as well as I can and make up their own minds.

Q. You say you can't, on reading those pages, tell the jury whether there was a complete failure of evidence to tie Roy to Sullivan? You actually can't tell them? A. I'd rather let them make that judgment. The Ballot Law Commission made the judgment, and I felt they must have felt there was some relationship between these people.

[75] Mr. Brown: I move that that answer be stricken as unresponsive, incompetent and prejudicial.

The Court: It may be stricken.

Mr. Reynolds: My exception, sir.

The Court: Exception noted.

The Witness: I can't answer the question, your Honor. I think the jury can read the record. My mind is set on the matter. I was a partisan in this proceeding.

The Court: You have answered that you can't answer.

Q. [By Mr. Brown] Mr. Millimet, what the situation is sir, as you've just said, you're so partisan that although

there was no evidence adduced, you went into that hearing and you came out of that hearing convinced that that was the fact; isn't that so? A. That Mr. Roy had procured—?

Q. Yes, sir. A. No, I didn't.

Q. Take a look at your own statement, sir, your own statement in that regard, on Page 55 of the record, and you tell this jury whether or not you were actually taking the position [76] before the Commission that Roy was the only one who would benefit and Roy was the one who probably procured the filings. A. Page 55?

Q. Yes, sir. A. I better start at the top of the page. I took exactly the opposite position, exactly the opposite of what you're suggesting.

* * *

A. Mr. Wyman, who was Attorney General at the time, was one of the members of the Ballot Law Commission, and Mr. Wyman, as [77] the jury and everybody may recall, had been investigating subversive activities and seeking to prove that people were Communists, and so on; and he was the one who was conducting a discussion with me on Page 55 to which Mr. Brown referred; and he said to me, "How are you going to get inside his mind and find out if he is a straw"—referring to any one of these candidates—"unless you prove somebody put him up to it?"

In other words, Mr. Wyman was saying to me that I had to prove that somebody put these fellows up to filing in order to draw votes from Professor Hill.

And I said, "The Attorney General has in his mind from this statute—No one will ever prove this. No one will ever admit it. This is like the Communists. You can't get your proof and I can't and you never will. Look in Massachusetts. We have people by the name of Kennedy running for office, and just because their name is Kennedy." Now,

I was taking exactly the opposite position from what Mr. Brown suggests I was taking. I was not saying that we proved Alphonse Roy filed these straws; I was saying we didn't have to prove it.

Q. Now, Mr. Millimet, read the jury what you said on that record, on that page, before what you just argued to them. [78] What did you say about the Franco-American, the one who filed first for Congress and then turned the filing into one for the senate? A. I don't recall.

Q. That's not on the page that you're looking at? A. No.

* * *

Q. Would you check to see that my reading of the transcript is correct? Page 55, starting at the top: "Mr. Wyman: Is it your position that a candidate is vulnerable to a petition to remove him if the candidate, whoever it may be, has no reasonable prospect or there being any likelihood of his being nominated? Millimet: It is like when fact [79] becomes law—given accompanying circumstances, but not on the fact alone. The given circumstances here:—no contact with members; no financial assistance; a candidate has a type of record likely to meet with public disfavor; where there is only one candidate with Franco-American origin; where all filed late in the closing period; where the Franco-American filing is withdrawn for another high office; when all those circumstances occur, yes, it is." That was your actual position, wasn't it? That was your position, and did I read it correctly? A. Well, you read it almost correctly.

Q. What did I—A. Oh, some little thing I noticed, but it doesn't matter. But that was not my position. That was just a summary of what had been shown. My position is shown in the paragraph that I read, that we didn't have to prove any such thing and that we didn't take the position that Mr. Roy procured the filing of these straws. I don't think it would have made any difference whether

Mr. Roy procured the filings, whether the straws did it just to hurt Mr. Hill because there was something they didn't like about Mr. Hill or about me or about Murray Devine or about John Kennedy or anybody. The thing that I was saying to the Ballot Law [80] Commission was that, as I said in my petition, if they were obviously not bona fide candidates—and those things do not refer to Mr. Roy as not having any financial support or not being a bona fide candidate; it refers to the others—if they were obviously not bona fide candidates but filed for the purpose of drawing votes from others who were candidates, bona fide candidates, it didn't make any difference who procured the filing; and that was the position I took then.

Q. Well, Mr. Millimet, whether it was or not, your reference in stating why these straws should be taken off, in spite of the fact there was no evidence of contact, no financial remuneration, the one thing that you pointed out was that there was only one Franco-American candidate and he had shifted from a filing for the Congressional seat to the Senate seat, and that was a circumstance that indicated that the three Irishers were straws. Isn't that actually what you said, what you meant? A. I said that and I said a lot of other things, according to that transcript.

[86] Q. [By Mr. Brown] Now, Mr. Millimet, you told us earlier that you talked to Mr. Pearson by telephone from your home sometime between September 1 and September 8 and that Mr. Pearson called you, didn't call him; is that correct? A. Well, it's correct that he called me . . .

[88] Q. What, Mr. Millimet, did he indicate was the occasion for him calling you? Why you? A. Well, I don't know whether he indicated that or not. It's obvious that he might have called me because I had been counsel for Mr. Hill, or that I was Mr. Hill's campaign manager. I don't think he indicated why he called me.

Q. That's what I want to know. In which capacity was he contacting you, because you were Hill's campaign manager? A. I don't know.

Q. You don't know? A. I didn't ask Mr. Pearson. He didn't tell me.

Q. But you made it known to Mr. Pearson that you were Hill's campaign manager? A. Oh, I think he knew that before he called me.

Q. So he knew he was talking to the campaign manager for Hill? A. Well, I can't say what he knew, but I think he must have, probably. I don't know. Look, Mr. Pearson is a national reporter. This is a little state. I can't say for sure what Mr. Pearson knew. I'm sorry. Even after talking with him I shouldn't say that.

* * *

[91] Q. In your deposition, Page 7 — Page 8 — you testified under oath in the deposition, Mr. Millimet, that you probably discussed with Mr. Pearson your theory that Roy was sponsoring straws? A. Oh, I don't think I did.

Q. Your testimony was that you — A. Page what?

Q. Page 8. — that you told Pearson you had heard stories about Alphonse doing these things but were unable to produce evidence. Now, did you or didn't you give this philosophy and theory of yours to Mr. Pearson in that telephone call? A. Well, I could have. I just don't know. I could have. . . .

* * *

[93] Q. . . . Page 10 of your deposition. You testified under oath that you did probably tell Pearson these stories, and if you did, you also told him that they were only gossip and that you had no evidence to back the stories up. Isn't that right? A. No. Those questions you are asking me are compound questions, Mr. Brown. I didn't say that. I said I couldn't recall. I started right out — the question asked me was: "Did you tell Mr. Pearson about the stories

that were current?" And I said, "I can't recall. If I told him, I am sure that I told him also that it was nothing more than gossip and that I had never seen any direct evidence. I frankly never retold this stuff. I didn't think it was good for the Democratic Party. I wanted Alphonse's assistance in the Democratic Party, and I have always helped him when he was a candidate. If I told [94] Pearson about it, I am sure I said it was just a rumor. When anybody would ask me these things as you are, I would say these stories; and frankly, I know nothing more about it than the rumors.

Now, I don't recall telling Mr. Pearson any of that, and I didn't mean to imply that I did, and I don't believe that I did. All I'm saying is that was my general attitude, my personal attitude toward this whole thing about Alphonse Roy, that I wanted his help —

Q. All right Mr. Millimet. Let's go back to the bottom of Page 7. You were under oath at that time, too, and you were asked this question: "Do you remember whether there was any conversation as to whether or not Mr. Roy was in any way sponsoring these alleged straw candidates?" And your answer, sir: "Yes, I think probably that was discussed."

Now, Mr. Millimet, you say that you have no recollection from time to time, but every now and then your recollection is good. Now, you said in that deposition, Page 7 — Page 8, that in all probability you did discuss this with Pearson. A. Discuss what with Pearson?

Mr. Reynolds: I'm going to object. He said "discuss these straws". The [95] allegations were Sullivan, McCarthy and Robinson, not Roy. I think Brother Brown is taking this out of context. It was never alleged Mr. Roy was a straw.

Q. [By Mr. Brown] Mr. Millimet, I don't want to be taking unfair advantage of you, if it were possible for me to do it, which I doubt. At the bottom of Page 7 — and this is

Mr. Guenther, my partner, not me, asking the questions: "Do you remember whether there was any conversation as to whether or not Mr. Roy was in any way sponsoring these alleged straw candidates?"

Now, is that the question? A. Yes, it is.

Q. And what was your answer, sir? A. I said, "Yes, I think probably that was discussed."

Q. And you went on to say — your next question was: "And what do you think you told him?" A. My answer was, "I think I told him what happened."

Q. ". . . that I had heard stories around that this was Alphonse's doing but that I was unable to produce any evidence that it was, and that Mr. Roy had denied it in the proceedings before the Ballot Law Commission." [96] Isn't that what you said? A. That's what I said. And I said all the other things that I have read out previously.

Q. How do you want to leave it now? Did you probably tell Pearson that in your judgment Roy was involved in sponsoring the three straws that you tried to get off that ballot? A. After talking with Mr. Pearson and going over his personal notes with him since this deposition was given, I think I probably did not discuss this in detail with him. I don't think he asked me about it, and I don't think I told him about it. This was my memory without refreshing it by talking to Mr. Pearson.

Q. So that your own independent recollection at the time you gave the deposition you have now modified as a result of what Mr. Pearson has told you; is that it? A. Well, I think that on the whole my memory was that I didn't have any real memory and I was trying to search it and I couldn't recall. I kept saying over and over again that I didn't recall it, that it might have happened, it would have been logical to happen, and so on; but I think now that probably I didn't get into this issue with Mr. Pearson at all in any such detail as you imply.

Q. It stands now that your present view, as modified by [97] Mr. Pearson's view, is more probably correct than your independent recollection when you gave your deposition; correct? That's the situation; correct? A. I don't understand the question. All I can say is that I have, since giving this deposition, have gone over Mr. Pearson's handwritten notes which he has, and from the evidence in those notes, I think it probable that I did not discuss the details with him concerning Mr. Roy. I still will say, as I said in my deposition, Mr. Pearson could very well have asked me about the whole thing before the Ballot Law Commission and I could very well have told him whatever happened at the Ballot Law Commission, because that was what was the most significant thing about my participation in the campaign up to that point, and he might have asked me and I might have told him, but I can't remember for sure one way or the other after all these years.

Q. Mr. Millimet, in connection with the Ballot Law Commission proceedings, you and your office conducted factual investigations into the background of some of the candidates; is that correct? A. That's a compound question, but the answer is I don't think I personally conducted any investigation but I think the [98] office did.

Q. That's what I asked you, you or your office? A. I thought you said "you and your office". I'm sorry.

* * *

[127] Q. [By Mr. Brown] Mr. Millimet, the notes clipped with that statement as to what it is, they are the Red Book returns [128] of campaigns that Sullivan won, for example, as well as campaigns that Roy won, isn't that so — also when they lost? A. Well, I asume that's what they're from, the Red Book. I haven't checked it back, but if you want me to tell you what I think this is, I think this is an attempt on the part of some clerk to look for something and this is what he came back with. Now, I don't know.

Q. And he got a negative, although he's looking for Roy as a straw and Sullivan as a straw. Sullivan was found not to be a straw; correct? A. Sullivan was found not to be a straw in the Ballot Law Proceeding. That's correct. But we were certainly trying to prove that he was. We said we believed that he was.

Q. And you believed that Alphonse Roy was in some way responsible for his filing as a straw, and the others; isn't that so? A. Well, since that time I've heard other evidence, of course. Since the time the Ballot Law proceedings were closed, we've had other evidence.

Q. Now, here again, this is the third document which you have here. Whose handwriting is this, can you tell? A. Well, it looks like Mr. Reynold's handwriting.

* * *

[145] Thursday
December 8, 1966
10:10 a.m.

In Chambers

* * *

[151] Mr. Brown: The other matter that I would like to bring to the attention of the Court at this time is a matter that came up yesterday during examination before the jury, and I did not pursue it then because the Court inquired whether I was asking for an order of the Court in connection with the [152] production of other information, and obviously this was not appropriate to be gone into before the jury. Judge Dunfey's order on disclosure of sources advising Pearson of the substance of the article which we complain of was specific that the defendants were to reveal and advise us of the names and addresses of all persons who were sources of information for that article, all names known to the defendants and to Pear-

son. The order is specific that it includes those in Pearson's possession or knowledge. Now, if it please the Court, in this article there is direct reference to a telephone call from Roy to Lavallee. Lavallee is quoted, and the artice says that Pearson called Lavallee to inquire whether or not this phone call had been made. Mr. Millimet has said, his testimony is that he had no [153] knowledge of the telephone call at all, so obviously Mr. Millimet did not advise Mr. Pearson that such a call existed. Mr. Scott, who is the second of the sources that were identified, has testified by deposition in precisely the same fashion, that he had no knowledge of such a telephone call and first learned of it by seeing it in the article. Lavallee was called for verification as to whether the call took place, and Lavallee had no other contact with Pearson, according to Lavallee's deposition; and consequently, there is another source, the source who advised Pearson that the telephone call had taken place, and that person's identity is still being withheld; and I think that this situation is evidence that Judge Dunfey's order was not and has not yet been complied with. I would like the Court to order that [154] all sources known to Pearson, as well as to the defendants, be disclosed right now so that I can properly continue my examination in this case.

* * *

[155] Mr. Millimet: I'll dc whatever the Court tells me to do, your Honor.

The Court: Well, isn't there an order in existence already that the defendants make this disclosure?

Mr. Millimet: Yes, and I thought I had complied with it when I gave Mr. Brown the information I did. ...

* * *

[159] Mr. Brown: Who is the source that gave him the information about the telephone call from Roy to Lavallee?

Mr. Millimet: I don't think I'm obligated to disclose that, your Honor. I'm only obligated to give the names the best I know. I'm not obligated to disclose our case.

* * *

[160] Mr. Brown . . .

* * *

. . . I just don't think I'm getting compliance with Judge Dunfey's order under these circumstances. Pearson must know.

The Court: Well, if the defendants' attorneys take the position that you are, I [161] would suppose there is no ruling or no procedure that I can follow at the present time, because there is an order in existence and both counsel are aware of it and have read it.

* * *

[162] Mr. Brown: Mr. Millimet, that isn't what I invited the Court's attention to. Mr. Lavallee's deposition said the phone call asked him to verify that the call had taken place, which means Pearson had prior knowledge of the telephone call; and what I am bothered about is your apparent inability or unwillingness to state the probable source of that information to Pearson which prompted Pearson's call to Lavallee.

Mr. Millimet: I think I've complied with the Court order. The Court didn't require us, and I don't think properly could require us, to disclose our entire case. The manner in which this came to Mr. Pearson's attention is up to my [163] brother to ascertain, and we've given him the names.

Mr. Brown: Well, your Honor, I think I have to agree with the Court's comment that in view of what

my brothers say, there is nothing that the Court can do at this time; but I am going to ask that the Court do something if it does develop that this informant, this source, is being withheld; and if Mr. Pearson shows up to be a witness, by the time his testimony is over, that situation should be out in the open.

* * *

[185] Q. In that campaign do you say that you worked for Roy? I want to be specific about this, Mr. Millimet. You can appear for an entire ticket at functions, and you can also support individual candidates. Did you do anything for Roy other than include him in whatever encouragement you were giving the voters speaking for the entire ticket? A. Well, if you're suggesting I became his manager and campaigned specifically for him, I don't think I did, but I certainly campaigned for him; and I think that in that campaign I wrote his principal speech. Now, I could be mistaken, but my partners have — one of my partners who was around at the time reminded me of it, and I think I did. And I also think I — and my memory has been refreshed just by casual things, as I started to tell you, and this brought it back to me — when I went and got my hair cut this morning, the barber said to me —

Q. I'm not interested in the barber's comment to you, Mr. Millimet. If it becomes necessary to have Julian testify, I'll put him on and let him testify. A. Well, I think it might be a good idea.

Q. I'd prefer you not put words in the mouths of other people. You know perfectly well that it's improper.

[186] Mr. Millimet: Well, your Honor, these things are brought back to my memory by my casual encounters in my daily life. This is not something the barber said to me. This is something I remember. In 1958 Bernie Boutin was running for Governor, and it was his first campaign for

Governor, I believe, and we were really working hard for his election, and we had a big torchlight parade right here in Manchester, culminating, I think, in a rally — I think it was at the Sweeney Post. It might have been at the Carpenter — and I can recall Mr. Roy there. I think I helped him with his speech. I think I introduced him and praised him to the skies. And whenever Mr. Roy has gained the nomination, anything I ever felt about him in the primary or anything I ever did in the primary I put aside and I supported him as fully as I supported anybody else on the ticket, and I always [187] worked for his election.

Q. [By Mr. Brown] So that in 1958 you were praising Al Roy to the skies as a man qualified for the office of Congressman and urging the New Hampshire voters to vote for him for that office? A. Sure. He was the candidate of our party, and I believe that you can not run the United States of America without the two-party system, and I would support anybody we nominated to the best of my ability and without stating outright fabrications. In politics, you swallow your personal beliefs on many occasions. I supported John Shaw the same way, even though I believed he was in cooperation with the Union Leader, our most devoted enemy in this state. I think you have to do that if you're going to be active in the party.

Q. Aren't you the fellow who has recently represented the Union Leader? A. Pardon? I never represented the Union Leader that I can recall — you mean the zoning thing? That wasn't for the Union Leader. It was just a nominal party.

* * *

[191] Q. . . . Mr. Millimet, you previously told the jury that Mr. Pearson called you at your home. You didn't call Pearson, Pearson called you? A. I think that's so, Mr. Brown, yes.

Q. And he called you — your recollection — sometime between September 1 and September 8? A. Well, I think that's approximately the time, yes.

Q. And at that time you were campaign manager for Herbert Hill? [192] A. I believe I was. I might have been registered as — I don't know whether I was registered as such, but in effect I promised Herb I would run his campaign for him, and I was doing my best.

Q. And you were running his campaign? A. I think I was, along with him.

Q. And Pearson talked to you, as you told us yesterday, about Herb Hill's chances, amongst other things; correct? A. He may have. He may very well have.

Q. Do you know whether he also talked to Herb Hill?

* * *

A. I believe that he did, yes.

* * *

[8] *Cross Examination*

[By Mr. Reynolds]

* * *

[27] XQ. Well, there's been some testimony of the name of Mr. Scott. [28] I gather he is going to testify. Now, what dealings did you have, if any, with Mr. Scott in regard to Drew Pearson before this article was published? A. I don't think Mr. Scott and I ever mentioned the words "Drew Pearson" in each other's presence. I have no memory of ever discussing anything with Mr. Scott. I would reasonably believe I never discussed Mr. Pearson, the Washington Merry-Go-Round, or anything connected with the — certainly not connected with this article — prior to the time that this column was published and this lawsuit was brought; and to the best of my memory, I didn't talk

with Mr. Scott about it until about a year after the lawsuit was brought. I can't recall the exact time. I should have done it sooner, probably; but there was a jurisdictional problem in this case, and I don't think that I ever even talked with Mr. Scott for maybe more than a year after this lawsuit was brought.

* * *

[29] XQ. Mr. Millimet, up through the time that this article was published, September 10th, I guess, 1960, what were your relations and dealings prior thereto with Mr. Scott? A. Well, of course, I'd known Joe Scott through a great many [30] years. I guess probably I — no — I lived over in his ward at one time. I think that's the way I first met him. I lived on Coolidge Avenue, and he lived up on Kelley Street in the same ward for a couple of years, and I think I met him there, and I think we had been in his house a couple of times, my wife and I.

XQ. I'll bring it up a little closer — A. When we moved, I hadn't seen Mr. Scott very much for quite some time. I think I had some dealings with him in the party from time to time, mostly in a fund-raising capacity. Mr. Scott, I think — I haven't checked this, but I think at one time he was either the treasurer or assistant treasurer of the party; and in this particular campaign my recollection is —

XQ. The Hill campaign? A. In this particular campaign he was active in helping raise funds, and I think he helped raise funds for Herb Hill. He liked Herb. And in fact, I wouldn't be surprised if he participated in Mr. Hill's campaign back in 1948. But in this particular campaign, my recollection is that Mr. Scott was active for Mr. Hill, but I didn't see a lot of him. We just weren't that well organized.

* * *

[31] *Redirect Examination*

[By Mr. Brown]

* * *

Q. But, Mr. Millimet, at that same proceeding, sir, the other three candidates whom you were attacking as straws did not [32] voluntarily put their criminal records before the public; you put those records in, didn't you? A. I put them in the proceedings, yes, sir.

Q. And insisted that they be made a part of the public record, even though in Mr. Sullivan's case he didn't deny the fact; correct? A. I don't recall that. I wouldn't say that I didn't do it. Whatever the Ballot Law Commission proceedings show, they show. I was being a lawyer, Mr. Brown, just as you are here, and I was doing what I conceived to be my duty in that capacity in a proceeding that was like a judicial proceeding. Not exactly like it, but one which was conducted like it.

Q. But you had the Clerk of Court present with the records, and although nobody denied the records, you insisted upon making those records a part of the public record of that proceeding; isn't that right? A. I cannot recall, but they were already public records, Mr. Brown. What I had there were public records. I was just taking the court records and putting them into the Ballot Law proceedings. They were already a matter of public record.

Q. One other thing. You counseled with and advised and went over with Mr. Scott the areas involved in this case on [33] which he might be examined at the time his deposition was taken and before it was taken; isn't that so?

* * *

A. I talked with Mr. Scott in a general way, to the best of my memory, after Mr. Pearson — or Mr. Pearson's attorney — told me that Mr. Scott had talked with Mr. Pearson before the publication of this column. I haven't checked

the date, but my best memory was that that was, as I said a moment ago, or before recess, more than a year after suit was started. I talked with him briefly the morning that his deposition was taken; and as Mr. Guenther knows, Mr. Lavallee's deposition and my deposition and Mr. Scott's deposition were all taken on the same morning, and I also [34] talked with Mr. Lavallee briefly — I'm not sure whether it was that morning or on some previous occasion not long before the deposition was taken; and I talked with both of them in my capacity as a lawyer.

* * *

[36] TESTIMONY OF JOSEPH F. SCOTT

who was called as a witness, and having been first duly sworn, was examined and testified as follows:

Direct Examination

[By Mr. Brown]

Q. What is your full name, sir? A. Joseph F. Scott.

* * *

Q. And how old are you, sir? A. Forty-five — fifty-five. I beg your pardon.

Q. What do you do for a living? A. I work for the United States Treasury Department as Director of the Savings Bonds Division for the State of New Hampshire.

* * *

[39] Q. . . . Now, Mr. Scott, Mr. Millimet has already advised the Court and jury that your deposition was taken on the same day that his and Ralph Lavallee's deposition were taken, at my office next door, and that date was October 13th, this year. Do you [40] recall you were sworn to tell the truth and that you did answer questions on that occasion in that process? A. Yes, sir.

Q. You were given an opportunity, sir, to sign the de-

position after it was transcribed? That's correct? A. That is correct.

Q. And you have refused to sign it? A. That is correct.

* * *

[43] Q. All I'm getting at, Mr. Scott, wasn't — it wasn't the situation that you didn't have time to read it; you were given overnight, in fact, the way it turned out? A. I was not given overnight.

Q. You took overnight? A. I guess you could say that.

Q. So that you did have an opportunity to read it and you did read it? Yes.

Q. All right. Now, I want to ask you, before I go into my examination that prompted me to call you, sir, to ask you the thing I asked Mr. Millimet. Is there anything in that deposition, in the testimony you gave under oath October 13th, that you now want to change? A. No, sir.

Q. Is it your testimony on the stand here now that your answers in the deposition were the truth? A. Yes, sir.

Q. All right. Now, let me ask you, Mr. Scott, whether Joseph Scott talked to Drew Pearson? A. Yes, sir.

* * *

[44] Q. . . . Mr. Scott, you've read the column before, haven't you? A. Yes.

Q. And you know generally what the content of the column is at it relates to the New Hampshire situation, don't you? [45] A. Yes.

Q. You went over this before you gave your deposition on the 13th of October? A. No, sir.

Q. You have it before you? These gentlemen just gave it to you on the stand? A. Yes. I have it here.

Q. It is the fact that that column contains an assertion that Alphonse Roy was a former small-time bootlegger? You know that's so, don't you? A. Yes.

* * *

[46] Q. [By Mr. Brown] Mr. Scott, you have already

said that you talked to Mr. Pearson concerning the subject matter that's in that article? A. Yes.

Q. In whatever discussion you had with Mr. Pearson, was there any discussion as to whether or not Mr. Roy was a former small-time bootlegger? A. Yes.

Q. And what — A. Excuse me. The term "small-time" — I don't think — — I don't think that entered into it, but I don't know for sure, but I don't want to be specific. I don't recall that "small-time".

* * *

Q. . . . How many times, Mr. Scott, prior to the publication of this article, did you have occasion to talk to Drew Pearson? A. Once, twice — I'm not sure.

Q. If you said in your deposition once, twice or three times — A. Prior to the publication of this?

Q. Yes. A. If I said that, I was mistaken.

* * *

[50] A. I'm sure I did not talk to him three times. If I talked to him twice, it's the outside chance.

[51] Q. When was the first time, sir, that you talked with Mr. Pearson? A. I don't know the date, but I was in this room in a hotel and somebody came out and said, "Drew Pearson" — or somebody said that Drew Pearson's office was on the phone and they wanted some information concerning fifty thousand dollars that had been sent up here to finance Herbert Hill's campaign and do you know anything about it, and somebody said, "Jesus, Joe, you've been working with him. Why don't you get on the phone?" Well —

Q. You were in whose hotel room? A. Pardon?

Q. You were in whose hotel room? A. This was probably one of those sample rooms. They're adjoining and connecting too, and this call was in the other room from where I was, whatever I was doing there —

Q. What hotel? A. The Carpenter.

Q. Here in town? A. Yes.

Q. Was Mr. Pearson here in town on that occasion? A. I never saw him.

Q. You answered a phone call in somebody's room? [52] A. No, no. These were two adjoining and connecting rooms.

Q. Well, whose — who had the use of the rooms? To whom were the rooms charged? A. I haven't the slightest idea.

Q. How did you happen to be operating in the two rooms without knowing whose rooms they were? A. Well, this was not my concern, first of all. Now, I had been made aware of — that some political function was going to take place, and I went there, and during the time that I was there — I don't recall what we were doing, whether we were going to order some bumper strips or placards or what. I don't remember this.

Q. Mr. Scott, was it a Republican Party function? A. No, it was not.

Q. All right. So we've got it down, narrowed down, a little bit. It was a political function? A. Purely.

Q. Was it one put on and attended by Democrats? A. It wasn't a function in the sense that we were having a dinner or something like that. This was a working meeting.

Q. Mr. Scott, all I am attempting to do, I want to know when, when you had this first contact with Pearson. Now, is there anything in your memory that is sufficiently clear so [53] that we could fix the date? Was this about a primary, a general election, a pre-primary, or what? A. It was before the primary.

Q. Before the filing period? A. I don't know.

Q. Well, you say that somebody was talking about fifty thousand dollars being sent up here for Herb Hill's campaign? A. Yes.

Q. This was in 1960, I take it? A. Yes.

Q. Had Hill already filed at the time of this meeting? A. I believe so.

Q. Was it known at the time of this meeting that there was going to be primary opposition? Yes.

Q. That would have meant, then, that at least Mr. Roy must have filed before the meeting; is that right? A. I'm pretty sure, yes.

Q. So that the date is going to be a date after both Hill and Roy have filed? A. I would think that's right.

Q. All right. Now, let me ask you this, sir: Was it, do you think, before or after Mr. Hill — excuse me — Mr. Millimet [54] — started his Ballot Law proceedings, which I think we have established, with his assistance, was the 30th of July? Was it before that or had that already taken place? A. I don't know. I don't know.

* * *

Q. [By Mr. Brown] Mr. Scott, can you tell us whether this telephone call, the first one you've just talked about, [55] whether it was before or after the state committee meeting at the Carpenter which was held July 31st? A. I was not aware of this state — I may have been at the time, but when this came up in Mr. Millimet's testimony this morning — I don't really recall that meeting at all.

Q. You mean you weren't there? A. No.

Q. Didn't you hold an office at that time? A. I don't think so.

Q. Well, how do you want to leave it, you don't know whether it was before or after the Ballot Law Commission proceedings that you had this conference? A. Well, you understand I didn't keep a diary of my day by day activities.

Q. Yes, sir. I appreciate that, but it may be of some significance when these things took place, sir. All I'm trying to do is to enable you to be as precisely correct as possible under the circumstances. We know that the newspaper

article was published September 20. Now, it was before September 20. How much before? A. My recollection of this —

Mr. Millimet: September 10, not September 20.

Mr. Brown: Thank you. September 10.

[56] Q. It must have been before September 10. That's the date of the article. A. It was before the — this thing was published, but it seems to me it was some time before; and the next time the thought occurred to me, somebody asked me if I had seen this thing, and I looked it over, and I had not been aware of Ralph Lavallee's — that part of it at all. This I learned from the column.

Q. Mr. Scott, when we took your deposition, you told us that in this discussion with Pearson, the first one, that you discussed Hill and Boutin and that you also discussed Roy and Frank Sullivan. You recall? A. Yes.

Q. Did you in fact discuss those four men with Pearson on that first occasion? A. I'm pretty sure that I did.

Q. And in what wise did you discuss Hill and Boutin — favorably, unfavorably, or how? A. Favorably.

Q. To what effect? How did this conversation get going? A. Well, after we had discussed at length — the main part of this conversation was concerned with some information that had come to Drew Pearson that the Kennedys had sent fifty [57] thousand dollars up to New Hampshire to finance Herbert Hill's campaign, and this was ludicrous. We had very little money raised and we had contracted bills for printing and other things of — I don't know — two, three thousand dollars.

Q. That's not my question. How did you discuss with Pearson Hill and Boutin, in what manner? A. Well, then these people were — he asked me about, probably, this McCarthy, whom I didn't and don't know, and about — well, to save time, if you will tell me the name of that other fellow —

Q. Robinson. A. Robinson. I didn't and still don't know him.

Q. What I asked you about was what did you tell him about Boutin and Hill? A. That we were hoping to get Bernie Boutin elected and we hoped that Hill would run a good race, strengthen the ticket, help Kennedy to get votes, and hopefully, if lightning struck, he might be elected.

Q. And what did you tell him about Roy and Sullivan? A. Well, I was getting to Sullivan, whom I know fairly well, or I knew fairly well.

Q. This is Frank Sullivan? [58] A. Leo Frank Sullivan.

Q. The Frank Sullivan who filed and ran third in this race? A. Right.

Q. You say you knew him quite well? A. Yes.

Q. All right. Go ahead. A. I probably told him how I first came in contact with him in a political way when he got the nomination for Congress back — well, whenever he was nominated for Congress. Emmet Kelly was running for the Senate at the same time.

Q. These are things that you told Pearson? A. Well, no. I'm trying to —

Q. Well, what I'd like to have you do, sir, is try to answer my question, if you would. What did you tell Pearson, the first telephone conversation, about Roy and Sullivan? A. Didn't you just ask me to explain how I knew Sullivan?

Q. I don't think so, Mr. Scott, and if I did, I've forgotten it. I would appreciate it if you would try to answer the questions I ask, and if there's something further that need be said afterwards and you're not asked, of course you can further explain. What did you tell Pearson on this first telephone conversation about Alphonse Roy and Frank Sullivan?

[59] Mr. Reynolds: Our objection. I think the witness

should be allowed to take them up one at a time if he wants to.

Q. [By Mr. Brown] Do you want to do it that way, sir? A. Well, in order to keep these things in reasonable order —

Q. Do you want to do it that way? A. I'm just trying to answer your questions.

Q. Mr. Scott, I asked you the way I did because that's the way you told it in your deposition. Now, would you prefer I ask about Sullivan separately? A. It doesn't make any difference.

Q. All right. Then tell us what you told Pearson the first time around about Roy and Sullivan. A. All I can tell you about that is what I have a strong feeling that I told him.

Q. Go ahead. A. I told you a few minutes ago that I did not keep a day by day diary of my activities during this period, but I knew a great deal about Sullivan and mentioned how from a rather promising individual in the labor movement he had — he had won the Toland Award at one time, shortly before he was nominated for Congress — that he had, well, fallen off upon evil days and, well, he didn't work, and so forth.

[60] Q. What did you tell him about Roy? A. Well, we went into this business of Democratic primaries where Hillsborough County is the key, and certain other small communities that are Democratic, and how by manipulating nationalities in there that somebody could pull off — get a nomination which he otherwise would not if he were confronted with one genuine opponent.

Q. Is that all you told him about Roy in the first telephone conversation? A. No.

Q. What else did you tell him about Roy? A. Well, in answer to an inquiry had I any information on Mr. Roy having been involved in liquor, I said I did.

Q. You told Pearson that you did have evidence that Roy had been involved in liquor? A. I don't know whether I said, "Mr. Pearson, I have evidence of that." I don't know the words I used, but I said I had information.

Q. To what effect? Information what, that he was a bootlegger? A. That he was.

Q. That he was. You told Pearson specifically that you had such information? A. Yes, sir.

[61] Q. Now, Mr. Scott, did you also discuss straw candidates and whether Roy was involved in filing straws in the 1960 Senate primary? A. I must have because this was — after the question of the money, this was the next thing, the straw candidates.

Q. And you did discuss the situation of straw candidates with Pearson; correct? A. Yes.

Q. And you did suggest to Pearson that Roy was responsible for them; correct? A. I don't know that I suggested that.

Q. You don't? Isn't that what you told us in the deposition, sir, that you discussed Roy's involvement as — A. Oh, we may have discussed it, but I don't know that I suggested that Roy was responsible.

Q. And so far as you personally were concerned at that time, Mr. Scott, did you think that Roy was putting the straws in? A. I thought so.

Q. Tell the jury what you told us as to why. Why did you think Roy was doing it, the straw part of it? A. Well, he was a Franco-American, Roy. Hill was a—I don't know, Yankee, or whatever, but non-French; and he put these [62] — we suspected that he put these people in — Frank Sullivan, which the name Sullivan attracts votes; Robinson, or Robertson, whatever his name is, was non-French, and —

Q. McCarthy. A. McCarthy. Now, in our Democratic primaries I would guess that a very substantial number

of people who go to vote are either of Irish or of Franco-American extraction, and this would tend to take votes away from a candidate like Mr. Hill as against Mr. Roy.

Q. This was a suspicion on your part. Did you have any evidence at all to back up your suspicion? A. Well, from observations over, you know, twenty years, in various primary contests, my suspicions, as you label them, have been borne out pretty well.

Q. Well, what evidence do you have that Roy had anything at all to do with anybody else's filing, other than your suspicious interpretation? A. At the time I was talking to Mr. Pearson?

Q. Yes. A. Probably none.

Q. All right. In that same first contact between you and Pearson, what if anything was said with regard to whether Roy, Alphonse Roy, had any improper relationship with [63] Senator Styles Bridges? Was that discussed?

* * *

A. I don't know if they were proper or improper, but there were good reasons to believe that he was friendly with Styles Bridges.

Q. Improperly friendly? A. No. I said I don't know whether — what you're trying to get at is proper or improper. I don't know what this is.

Q. Well, did you discuss with Pearson on this telephone call your thinking that there was some relationship between Alphonse Roy and Senator Bridges? Was that discussed on the phone? A. The best way I can answer that is that I probably indicated that there was suspicion of it.

Q. And if you indicated there was suspicion, you were talking about a relationship that you disapproved; correct? A. Yes.

Q. An improper relationship? [64] A. I didn't call it that.

* * *

Q. [By Mr. Brown] What was it that you told Pearson with regard to the Roy-Bridges relationship? A. I — in my judgment today, I would probably have taken the position that over the years very peculiar circumstances have arisen from time to time where straw candidates became involved in contests where Mr. Roy was involved.

Q. What's that got to do with Mr. Bridges? A. Pardon?

Q. What's that got to do with Mr. Bridges? A. Oh. And the rumor was that, on the national level, that straw candidates would be obtained or provided for Mr. Bridges.

Q. By Roy for Bridges? [65] A. Yes.

Q. That's what you told Pearson? A. Oh, I don't know that I told him. I said sitting here today some six and a half years after this thing occurred, I — I'm speculating on what I probably said, but I don't know that I said it in precisely the way I just repeated. It's impossible to recall the precise things that you talked about in a telephone conversation six years ago.

Q. Mr. Scott, let me just ask you one more thing on this phase of it and then I'll get away from it. Do you think that you suggested to Pearson that Roy tried to get Frank Sullivan out of Grasmere so that Sullivan could file in that contest? A. No. I didn't know about this.

Q. You — A. I didn't know about it until I read it in this column.

Q. So that is something that your memory is good enough on. You're sure you didn't talk to him on that aspect? A. I'm very sure about that. I couldn't have known about it.

* * *

[66] Q. [By Mr. Brown] Now, Mr. Scott, you've told us that you told Pearson that you had information that Roy was a bootlegger; right? A. Yes.

* * *

Q. Mr. Scott, I'm going to ask you to tell us, item by

item, with the dates as close as your memory will permit you to give them to us, and with the names of the third party witnesses — I want you to give us all of the specific instances that you say you know of Alphonse Roy being engaged in bootlegging. Now, what's the first one that comes to your mind? A. Shortly after I was named chairman of the finance committee for the State Democratic Committee.

[67] Q. Shortly after you were named — ? A. Yes. The convention was held over the weekend.

Q. What year? A. Well, the year that Herb Hill ran for Governor. That was '48.

Q. [At the blackboard] The first item you're going to tell us about is 1948, shortly after you were named finance chairman for the Democrats, state level? A. Right. In fact, I think that it was on the following Monday.

Q. The following Monday what? A. I got a call from Alphonse Roy at my office, insurance office, wanting to know if I was going to be there and he wanted to see me, and he came over and wanted to make a contribution.

Q. You mean a financial contribution? A. Yes. This was a delightful thing to have happen because we were broke.

Q. This is in 1948. Go ahead. A. Well, Mr. Roy came into the office, and I brought him into what I used —

* * *

[68] Q. . . . Pardon me. Didn't you say he came in to make a contribution? A. Yes.

* * *

Q. You got the hundred dollars out of him? A. Yes.

Q. What's that got to do with evidence about his being a bootlegger? A. Well, then we talked about that his term as Marshal was coming up and he hoped that I would lend my support. It had become quite evident that I was develop-

ing a friendship [69] with our national committeeman, our gubernatorial candidate.

Q. You're talking about Emmet Kelly and Herb Hill? A. Right.

Q. Go ahead. A. And we talked about, oh, when we saw one another back on the west side, how we were married into the same family group, and that in spite of some of the things that — well, he more or less came out and said that "Even though I was involved in these things that time is elapsing and, you know, it doesn't — this is gone." I agreed with him.

Q. Well, I don't know whether I agree or disagree with him because I don't quite understand what you're talking about. What did he actually say? A. Mr. Brown, I'm talking — this happened in 1948.

Q. Yes, sir. While Mr. Roy was the United States Marshal in the State of New Hampshire. A. Right.

Q. He had been cleared for that job in '45. He was coming up for reappointment. A. Well, he would —

* * *

[70] Q. . . . What I'm trying to get at, sir — I thought my questions were clear enough — I want to know each separate instance where you say you have any evidence that Roy was a bootlegger. Now, what is there in this — A. Let me put it this way —

Q. Go ahead. A. — that that day — and I don't recall the exact words — he told me that he had been.

Q. He told you what? A. That he had been a bootlegger.

Q. That he had been a bottlegger? A. Now, I'm not saying these are the exact words. I don't know what the exact words were. Yes, he did.

Q. All right. That's your testimony? A. Yes.

Q. No one else was there except you and Alphonse Roy; correct? A. Well, there was either one or two girls in

the other office. Whether the door was closed or not, I don't know.

[71] Q. Who were the one or two girls? Who were they? What's their names? A. Well, there was a Bertha Gibbons and possibly a Paula Osborn, but —

Q. What was the first one? A. Bertha Gibbons.

Q. And the other possibility is — ? A. Paula Osborn.

Q. Paula Osborn? A. Yes.

Q. Now, you say — your testimony is that Al told you that he had been a bootlegger; is that right? That's your testimony here under oath? A. Yes.

Q. What is the next episode that you want to tell us about that is evidence that Mr. Roy was a bootlegger? A. Well, we both attended, or drove cars, our cars, in a funeral for a Mr. Manseau, whom we were both friendly with the family, the whole family.

Q. What was the year of that funeral? A. I'd have to guess that it was, you know, eighteen, twenty years ago.

Q. Which Manseau are we talking about? What's the first name? [72] A. Well, he was known as "J. T. Manseau".

Q. "J. T."? A. I think his name was Joseph.

Q. And this was eighteen or twenty years ago, which would place it somewhere in the middle or late '30's —

* * *

Q. Late '40's? A. Yes.

Q. Late '40's. 1948 is in the late '40's. This is about the same time? A. No. It was — I don't know. I don't know. These are two isolated instances.

Q. Which came first in time? A. I can't be sure.

Q. All right. At the Manseau funeral you were both going to drive cars, and what happened? A. Well, this wake had been held at the home over to Goffstown Road.

Q. On Goffstown Road? A. Yes. In what is known as Amoskeag.

Q. "Skeag Hill"? A. Well, it's up the hill from the village.

Q. On the back road side? [73] A. Right. We were waiting there for, well, to be called to pick up whatever passengers we were going to have in our respective cars, and it was a cool morning. I don't know whether it was fall or spring. He came over and sat in the car with me, told me that he was seriously considering running against Mayor Benoit. Some things had occurred that he thought Benoit's popularity was dying out and/or diminishing; and whereas I don't remember what these things were, I agreed there were a couple of things that Benoit had done during that time that I didn't approve of particularly. However, I mentioned that boy, he was a hard man to beat —

Q. Benoit was? A. Yes. That whereas some of us might not like some of the things he did, the public took to him pretty well. And he went on to discuss his experience and that he had good organizational ability and that after Prohibition having been repealed this long that that phase of his life should be forgotten. And we talked about some other respectable businessmen who had formerly been involved in the liquor traffic.

Q. Mr. Scott, are you telling us now that on this occasion Mr. Roy again told you that he had been a bootlegger before [74] Prohibition was repealed? A. Yes.

Q. That's your testimony here under oath, that Mr. Roy told you that? A. Yes, sir.

Q. And the two of you were sitting alone in the car? A. Yes, sir.

Q. Nobody else within hearing? A. No. This conversation wouldn't likely take place in a group.

Q. Your second episode, this is, that you say that Al told this to you? A. Yes.

Q. And this is while Benoit is Mayor? A. Yes.

Q. And it obviously has to be while Al Roy is not Mar-

shal? A. I guess it must have been, yes. He couldn't —

Q. You say the discussion was with respect to his possibly running for Mayor? A. Yes.

Q. He was Marshal from 1945 till 1953, Mr. Scott. When was this funeral that you're talking about, or are you mistaken about this? [75] A. I'm not mistaken about the funeral, but just when it occurred — I couldn't tell you when my father's funeral was.

You just told us, sir, that the conversation was that Al was going to run for Mayor against Benoit and the two of you were talking that Josephat would be a hard man to beat, which, of course, he would be? A. Yes.

Q. When was there any time that Roy was in a position to run against Benoit? A. It must have been before then.

Q. Before 1945? Benoit wasn't in office before '45, was he? A. [No response].

Q. Well, let's leave that. What's the next episode?

* * *

[76] Q. ... What's the third piece of evidence you say you have that Al was a bootlegger? We've got those two. What next? A. Well, the thing that came to my mind when my deposition was taken was an evening when I was in high school.

Q. You were in high school? A. Yes. Coming down Kelly Street. And at the corner of Kelly and Reed Street there was a Shell station.

Q. A Shell Station? A. Yes. And there was a fellow whom I had gotten to know who was managing this place.

Q. What was his name? A. Frankie Moran.

Q. "M-o-r-a-n"? A. Yes.

Q. All right. Go ahead. A. I had known that Frankie had — he couldn't drink. If he took a drink, he went on a binge, but he was straightening himselft out. He was an automobile mechanic, as a matter of fact, but he had taken this job. And I came walking down the street, and he was

putting out the lights. I said, [77] "Gee, you're closing early, Frankie," or some such thing. He said, "Yes. Let's take a walk down to Al Roy's and get a drink."

Q. He said, "Let's take a walk down to Al Roy's and get a drink"? A. Yes.

Q. That's your testimony here under oath? A. Right.

Q. All right. Go ahead. A. And then I tried to talk him out of this, knowing of this weakness of his, but we went, and he bought a bottle and then bought two drinks, and I took a drink. I drank the stuff.

Q. Now, Mr. Scott, when you told us this on the deposition, the next question was, "Did Al Roy actually sell any of that liquor? Was he there?" A. No.

Q. Where was this place that you and Frankie Moran went? A. On Marion Street.

Q. Where on Marion Street? A. Oh, about half way between Main and McGregor.

Q. How do they pronounce that on the west side? They don't say "Marion", do they? A. They say "La Marione". [78] Q. Thank you. First or second floor? A. Second floor.

Q. And who actually was the individual who sold this pint or half pint and these two shots to you fellows? What was his name? A. Well, there were two or three people there.

Q. None of whom were Al Roy? A. No.

Q. Who was the one who sold it to you? A. Well, I don't know which one accepted the money and poured the drinks and handled the bottle, but there was a Shorty Glaude there.

Q. That's "G-l-a-u-d-e", isn't it? A. [No response]

Q. Who were the other two? A. I don't know. I may have known them then, but this is back in the '20's.

Q. Well, I'm going to get to that. When did you graduate from high school? A. In June, 1929.

Q. When you were up there trying to drink shots of hard liquor with Frankie, what were you, a senior, a junior or what? A. I may have been a senior.

[79] Q. Might have been a senior. So this might have been as late as what year? What year did you graduate, did you say? A. '29.

Q. So this is probably in '28 or '29? A. Well, I would put it possibly.

Q. Well, I'm trying to get this as close as we can, your best memory. A. Yes. But I don't want to say things that I'm not sure are correct.

Q. I don't want you to, sir, because you're under oath, and if you're incorrectly stating things, it's going to be embarrassing for all of us. You know that. You'd say that this was when you — probably when you were a senior? A. Possibly a senior.

Q. Earlier than that? Were you drinking when you were a junior in high school? A. No.

Q. Mr. Scott, all I'm trying to get at — you start your senior year in the fall and you graduate in the spring. If you graduated in '29 and this was when you were a senior, this would be either '28 or '29? A. Yes.

Q. It was before you graduated from high school? [80] A. I'm pretty positive, yes, but I'm not positive it was. I think when I mentioned high school, it was probably when I was in high school, but I didn't know that day that in December, 1966 I was going to be questioned about this or I would have probably made a notation somewhere.

Q. It might have been better if you had. Frankie Moran is dead, isn't he? A. Yes.

Q. Moran is dead so we can't rely on him to tell whether your recollection is correct or not? A. No.

Q. Shorty Glaude is dead too, isn't he? A. I didn't know that.

Q. Is he alive? A. I don't know. I don't know where he is.

Q. And you don't remember the names of the other two people you say were there? A. I don't remember who they were, as a matter of fact. Now, if this had happened last night, I probably would be able to tell you their names today.

Q. Mr. Scott, our jurors are not all from Manchester — A. I didn't hear the question.

Q. I say our jurors are not all from Manchester. [81] A. Oh.

Q. Where is Marion — where is Marion Street? A. Well, it's still there. It's on the west side of Manchester. If you take the Bridge Street bridge and bear left, except that you will run into a one-way street, you'll be going the wrong way if you're in an automobile, but if you went one block, Marion Street begins there and ends at Main Street, goes west to Main. It's a short street.

Q. Runs between McGregor Street and Main Street, does it? A. Right.

Q. And there's no side street connectig in between there except Groton Street. Do you remember that? A. Groton? Not by that name.

Q. Well, let me show you — you know what this is a copy of? A. Sanborn Map.

Q. Good. Fire map of the City of Manchester. Is that a page of it? A. Right.

Q. Does that show the entire area occupied by Marion Street? A. Yes.

Q. And is this a photocopy of that portion of the fire map? A. It looks like it to me.

* * *

[82] The Court: It may be marked Plaintiff's Exhibit Number 15.

[So marked]

Q. [By Mr. Brown] Now, Mr. Scott, you know this area well enough to know there hasn't been any major new construction over there since you were a kid; right? A.The only new construction was when some buildings were torn down and they built a wading pool there.

Q. On Marion Street, there hasn't been any substantial change for half a century until they pulled it all down; isn't [83] that right?

* * *

Q. ... Isn't that about the situation, Mr. Scott? A. Yes.

Q. Can you indicate on the photocopy of this map that we have marked as an exhibit, can you indicate whereabouts on Marion Street the second floor joint was where you and Frankie Moran each got a shot and he bought a pint? Can you tell, for example, which side of Groton Street, where Groton Street comes in? A. Oh, it's east of Groton Street. [84] Q. East of Groton Street? A. Yes. Whether it's there or there, I couldn't be sure.

* * *

Q. Which side of the street do you recall its having been on? A. North.

Q. On the north side of the street. And can you just put an "X" on each of those two stores, or two locations, that you think it might have been one or the other of? A. [Witness complied]

Q. You have now made two penciled crosses — A. Excuse me. Excuse me. [Witness erasing marks] You kept bringing up Groton, and that isn't —

* * *

[85] Q. . . . I'm not trying to confuse things, Mr. Scott. Those structures which show on Sanborn's fire map as of 1956 surrounding Marion Street, that is, from the McGregor Street end of Marion over to the Main Street end of Marion, how old were those structures? A. Very.

Q. Older than you and I? A. Oh, yes.

[86] Q. All right. Now, having that situation in mind,

your best recollection, in which of these buildings that are indicated — A. Well —

Mr. Brown: Let me finish my question.

Q. In which of these buildings, your best judgment, was it that you and Frankie went upstairs to buy the drink? A. Well, where you pointed your finger just then and where you were pointing your finger with relation to Groton — whatever it is — it's on the other side of the street.

Q. You said it was on the north side? A. Yes.

Q. And I asked you whether it was east or west of where Groton comes into Marion, and you said to the east, didn't you? A. No. I never heard of Groton Street until you mentioned it.

Mr. Millimet: May I see the map?

Q. You recognize the street coming in from the south that intersects the south side of Marion Street is indicated to be Groton? A. Yes.

Q. Regardless of whether that's the right name or not, was it east or west of where that intersection appears on the map? That's all I'm asking. [87] A. East or west?

* * *

Q. . . . Is that a direct copy of the section, Mr. Scott? A. Yes.

Q. Same size? A. Yes. Except when you were pointing your finger which building you were on the wrong side of the street.

Q. Sir, I'm not attempting to decide which building; I'm asking you to. Would you use your best judgment and just put an "X" where you think the location was, your best judgment? A. My best — here.

Q. And you have now put a large penciled "X" on the north side of Marion Street actually just about in line with where Groton Street, if it were extended, would go across the north side? A. I suppose.

* * *

[88] Q. . . . What is the next evidence that you have, or you know about, indicating that Alphonse Roy was a bootlegger? A. I'm — I think, referring to my deposition, there was something — and it might have been a wake. I think it was my wife's uncle's wake.

Q. Your wife's uncle's wake? A. Wake.

Mr. Millimet: I didn't get the name.

The Witness: I think it was on that occasion.

Q. Mr. Scott, you said earlier that you and Mr. Roy were both married into the same family. What family is this? A. Well, do you want me to explain this?

Q. You're married to one of the Norman girls? A. Right.

[89] Mr. Reynolds: Just a minute, Brother Brown —

Mr. Millimet: Let him explain.

A. My wife was a Norman. Her first cousin, Charlie Norman was married to a Gissel girl, and Mr. Roy is married to her sister.

Q. All right. Your wife's cousin's wife is a sister to Alphonse; is that it? A. I think that's probably it.

Q. All right. Now we've got that straightened out. Whose wake is it that you want to talk about now? A. I think it was George Norman's wake.

Q. George Norman's wake? A. I think. At which time— at any rate, whatever the occasion was —

Q. These aren't Irish wakes, are they? A. No.

Q. Go ahead. A. Whatever the occasion was, this was a fairly large home, and a group of men had congregated in one of the dens, or whatever you call it, in the back, and that was the occasion that I met Mr. Decelles, who made his home in Canada, a newspaper man, very fine gentleman. On the other hand, my father-in-law was a jokester. He liked to rib [90] people. And the ribbing got around to Alphonse, who was there for part of this time.

Q. A ribbing party? A. I didn't say that.

Q. You said people got around to ribbing — A. I said my father-in-law liked to rib people. You know.

Q. Lampooning? Kidding? A. That's a better word.

Q. All right. This is in the den amongst the menfolk? A. Yes. And for a short period he picked on Alphonse.

Q. Your father? Excuse me — your father-in-law? A. Yes.

Q. Didn't you say your father-in-law? A. Yes, my father-in-law. And there was this lampooning and everyone laughed and took it good-naturedly, and nobody made any great protest. That's all.

Q. Well, how is that any evidence that Alphonse was in bootlegging? A. Well, this is what the ribbing was about.

Q. Your father-in-law was kidding him — A. About —

Q. Claiming that he was? A. Yes.

[91] The Court: Excuse me, Mr. Brown. We'll take the afternoon recess.

[Short recess]

After Recess

Q. [By Mr. Brown] Mr. Scott, getting back to what happened the evening of Uncle George's wake — A. I'm not sure that that was the occasion, but I feel fairly certain.

Q. Your father-in-law who was doing the ribbing was Leon? A. Right.

Q. Well, your father-in-law actually is Leonce — A. Right. "L-e-o-n-c-e".

Q. Norman? A. Right.

Q. What other people, aside from Leonce and you and Al, were present when this was going on? Who else was there? A. The one that I recall very clearly is Mr. Decelles, whom I met for the first and only time.

Q. Now, that is the fellow from Montreal. A. I think he was from Montreal.

Q. Nobody else was there? A. Oh, I didn't say that. I don't know who else was there. There were several men, I'd have to say.

[92] Q. None of them you can recall the names? A. I told you, my father-in-law, Mr. Decelles, Alphonse Roy, Joseph Scott. Now, if there were two or four more, I can't be sure. This goes back, oh, sometime in the 30's.

Q. Sometime in the '30's? A. Yes.

Q. Both George and Leonce, according to the city directories, they were both alive at least as late as '37? A. Well, all right. That's the '30's.

Q. And you think this happened during the '30's, probably on Joseph's death? A. Possibly.

Q. When did your father-in-law die — he's dead? A. Yes. Maybe '46, '7.

Q. Right after World War II? A. I'll tell you, my mother died November, 1945. This I know. He came to my mother's wake. I recall that very clearly. And it was not years — you know, it might have been a year or two after that, but I'm not sure.

Q. So the best we can do at the moment on this is sometime after '37 and before '47, do you think? During that period somewhere? A. Well, I wouldn't be so specific as to say '37. I don't [93] know. In the '30's, I said. You supplied that '37. I'm not sure of it. We're talking about thirty-odd years ago.

Q. We're also talking, sir, about another man's reputation. A. Yes.

Q. So I'm asking you to be as specific as you can. Is there anyone else still alive — still alive — other than yourself and Al, that would be able to tell whether your recollection of this event is true or not? Is there anybody else? A. I don't know.

Q. There's nobody whose identity you can give us so we

can call them in to see whether they recall the same as you? A. Offhand, I don't know.

Q. All right. What's the next episode that you have? A. Next episode?

Q. The next specific thing that you say justified your telling Drew Pearson that Al Roy had been a bootlegger.

* * *

[94] A. I can't think of any specific instance.

Q. Well, do you want me to remind you of what you told us in your deposition? A. Yes. If you will, please.

Q. All right. What's the situation involving some fellow that was buying his supply of booze from Al, according to you? What's that situation? A. There was a fellow down the street from my family home.

Q. A fellow down the street from your family home? A. On Alsasce Street.

Q. On Alsasce? A. You know, once in awhile you could get a pint or a half pint in there, but he was not a steady — he had other employment. And sometimes, according to him, this is where his supply came from.

Q. What you're telling me, Mr. Scott, is that on Alsasce Street there was a fellow who was selling liquor while it was still illegal to do so? A. Oh, yes.

Q. And this fellow, you say, was buying his supply of liquor for sale from whom? A. This is according to him — [95] Q. According to whom? A. According to this fellow who sold the liquor.

Q. He told you that he was buying his booze from Alphonse. A. Told my father. He'd come across the street — he was friendly with us — come in the garden. I've overheard these conversations.

Q. You say that this gentleman, whoever he was, told your family, and you heard him, that he was buying his alky from Alphonse Roy? Is that the situation? A. That's the situation, except not quite the way you put it.

Q. Well, you tell me how it was. A. For reasons best — Look, I was a young kid at the time. I was expected to go out and help my father in the garden, and I did when I couldn't sneak away. We were friendly with all our neighbors, including this gentleman, and I overheard conversations about he didn't have, you know, he didn't keep a large supply and sometimes he wasn't able to accomodate.

Q. But what you told us on the deposition was that this man said he was buying his supply from Alphonse Roy; isn't that right? A. Yes. And that's what I just said now.

Q. And you say that you know from this fellow that he was [96] buying his supply, he said, from Alphonse Roy? A. Yes.

Q. What was the fellow's name? A. Bourque.

Q. "B-o-u-r-q-u-e"? A. Yes

Q. What was his first name? A. I haven't the slightest idea.

Q. Where did he live? A. On Alsasce Street.

Q. What years are you talking about? A. Oh, sometime in the '20's.

Q. In the 1920's? A. I would — that's my best judgment as of now.

Q. Was there more than one family named Bourque on Alsasce Street at that time? A. I couldn't tell you that.

Q. Well, you know, Mr. Scott, that they keep city directories that say where people live? A. Yes.

Q. This fellow was Ulrich Bourque, wasn't he? A. I don't know.

* * *

[97] Q. ... Now, Mr. Scott, you know where this fellow lived? You said this is on Alsasce and you were living at the corner of—northeast corner of Alsasce and—A. Bremer.

Q. And Bremer. Which side of Alsasce Street did his bootlegger live on? A. West.

Q. On the west side of Alsasce Street? A. Yes.

* * *

Q. ... Mr. Scott, your home was at the northeast corner of Alsasce and Bremer Streets; correct? A. Correct.

Q. And Bremer Street runs generally north and south? A. East and West.

Q. Alsasce Street runs which way? [98] A. North and south.

Q. Bremer east and west? A. Right.

Q. So that you say this fellow lived on the west side of Alsasce Street? A. Right.

Q. Using your friend Mr. Sanborn again, can you identify from the fire map, which shows the north side of Alsasce Street and the intersection with Bremer, what house you say this bootlegger lived in? A. Now, let's see where we — oh, this one here.

Q. You put your thumb right on it. It's the second house north of the corner of Bremer and Alsasce on the west side of Alsasce? A. Right.

Q. What is it, next door to your house? A. No.

Q. Across the street? A. Our home doesn't show on this map, but — get your fingers out of the way if you want me to help you here.

Q. It's across Alsasce Street from your house? A. Yes. You see, our house was on this corner here.

Q. On the northeast corner? [99] A. And we had owned this second house lot where we had a garden. This is where these conversations —

Mr. Millimet: We can't hear.

Q. Let me see if I can get it loud enough and clear enough so that we can all understand it.

What you're saying, Mr. Scott, is that on the portion of Alsasce that doesn't show on this page — A. Right.

Q. — your house was actually on the corner lot? A. Right.

Q. And you had a vacant lot to the north of that? A. Right.

Q. Where the garden was? A. Right.

Q. And directly across from that garden, in the second house on the west side of the street, is where this fellow, Mr. Bourque, lived that you say was a small-time bootlegger? A. I didn't say small — I didn't qualify it.

Mr. Reynolds: I object, your Honor.

Mr. Brown: Strike it out.

Q. A part time supplier? A. I think I said that he had other employment and this was a very minor operation with him.

[100] Q. He was just moonlighting a little bit? A. Probably. That would be a way to put it.

Q. Can you say yourself, is this a photocopy of the portion of the map that shows the — A. Let me look at it carefully.

Q. You better. I may fool you and myself both. A. [After examination] Yes.

Q. That is a photocopy of the section of the streets that are involved? A. Right.

Q. On the photocopy, would you please, in pencil, put an "X" at the house where Mr. Bourque lived? A. [Witness complied]

Q. You put your "X" actually on the lot that the plan indicates is 180 Alsasce, haven't you? Can you see those small numbers along the street? A. It's 180.

Mr. Brown: I'm offering the photocopy on which Mr. Scott made the "X".

[Shown to counsel]

Mr. Reynolds: We have no objection.

Mr. Brown: There is no objection, your Honor.

The Court: Plaintiff's Exhibit 16.

[101] [So marked]

Q. [By Mr. Brown] Mr. Scott, I want you to assume for

a minute that at that number on Alsasce Street in the years 1926, '27 and '28 that there was a Bourque listed as living who then removed from Alsasce Street and moved over to Bremer Street. It that the same fellow you're talking about now, do you think? A. I have no idea.

* * *

Q. Do you recall any other Bourque family on Alsasce Street at the time? A. Oh, no. No. I thought you said in the neighborhood.

Q. No, on the street. A. No.

Q. There was only one Bourque family on the street, so far as you know? A. I don't know. There may have been five and there may have been one. I don't know. I didn't keep a record of who [102] lived in what house on every street in my neighborhood.

Q. Mr. Millimet has requested that I have you indicate on Exhibit 16 in pencil the approximate location of your own home at that time. Would you make another lot line and just put "Scott" within the area? A. [Witness complied]

Q. You have put "Scott" in pencil on the corner and "Ditto" where the garden was? A. Yes.

Mr. Brown: [To the jury] Gentlemen of the jury, the exhibit shows Alsasce Street running north and south, Bremer east and west. The witness says that this his home was on the northeast corner, with the next lot also owned by the family as a garden; that the Bourque that he's speaking about lived in the house on the west side opposite the garden where he has indicated an "X" in pencil.

Q. [By Mr. Brown] Now, Mr. Scott, do you have any others? A. Pardon?

Q. Do you have any other knowledge, as you say, other than these, that prompted you to tell Pearson that Alphonse was [103] a former bootlegger? A. That was in response

to a question, general knowledge that people in the whole area seemed to know this.

* * *

[105] Q. ... Now, Mr. Scott, I did not intend in my last question, nor do I intend in any of my questions to you, to ask you to repeat hearsay rumors, gossip. I am asking you, sir, for the knowledge that you told us at your deposition you personally had that prompted you to tell Pearson that Alphonse Roy was a bootlegger.

Now, was there another specific situation that you — A. The only thing that prompted me to answer the question when it was posed was no particular specifics that came to my mind. I didn't, you know, push some computer buttons and have this information come to the surface. I don't know what came to my mind, in which direction my memory worked [106] at that moment.

Q. I'm asking you now, sir, were there other specific events that you say you have personal knowledge of that prompted you to believe that Mr. Roy had been a bootlegger? Was there a situation involving some Leo Beaulieu? A. Involving what?

Q. Involving someone by the name of Beaulieu. A. Oh. Well, right across Alsasce Street these people lived there — I think only briefly. There was strong suspicion in the neighborhood that they were doing some kind of selling of what turned out to be beer. One day the raiding squad, Manchester police department, went there. I have no idea what happened when they were inside, but in the early evening there was this — I think his name was Beaulieu —

* * *

A. This Beaulieu fellow, who was, I'm pretty sure, a cobbler, he was a lame man, drove this motorcycle, and they loaded the beer bottles in and went right down Alsasce Street and up a path that led up to, well, what we call Rock Rimmon. And this went on, and everybody in the neighbor-

hood observed it, and we were all baffled about what was [107] happening. The next day the people from the raiding squad enlisted, oh, a whole group of young boys that congregated up in what was known as Mahoney Park to go up and find under a bush five or six bottles of beer, and they brought them down and they laid them out in the field, and what they did with them from that point I don't know, and I don't know what ever happened to Beaulieu except that that evening when this moving process was taking place, Alphonse Roy and somebody else in the car drove up in the area. This could have been a mere coincidence. I am not suggesting that this is any evidence whatsoever. This came out in — I don't know how that came out in the deposition.

Q. In the deposition, sir, didn't you say that this was some evidence of Mr. Roy's bootlegging? A. Well, the people wondered what he had to do with — why he took this interest.

Q. Well, what do you say now? Do you say that this — you don't actually connect this up at all? This is just something that may have been coincidence? You don't know anything about whether Beaulieu and Roy were connected? A. I don't know of any connection, no.

* * *

[108] Q. ... And the spelling? Do you happen to know what it is? A. Oh, boy —

Q. That gentleman is no longer around New Hampshire? A. I don't know where he is.

Q. You don't know whether he's quite ill, perhaps in his last illness presently? A. I doubt if I have seen him since that period. I don't know.

* * *

[109] Q. ... Now, Mr. Scott, you told us with respect to the first episode, 1948, when Mr. Roy came in to make a one-hundred-dollar contribution to the Democrat organiza-

tion, that on that occasion there was some discussion of others who had been engaged in bootlegging but who had since attained respectability? A. Oh, that was when he was sitting in my car.

Q. At the Manseau funeral? A. Yes.

Q. Who were the other people who were being discussed? A. I don't know. We have had several prominent, successful people who were known to be bootleggers in town. I don't know who was mentioned at the time.

Q. Were actually any individuals mentioned by Mr. Roy in that connection, sir? A. I'm pretty certain.

Q. Well then, who were they? A. Well —

[110] Mr. Reynolds: I object to this in this proceedings, because this case could really go on —

The Court: I will sustain the objection.

Mr. Brown: Exception, your Honor.

The Court: Exception noted.

Q. [By Mr. Brown] With regard to the high school trip to Marion Street, didn't you tell us on your deposition, sir, that the men who were there operating that joint were very good friends of yours; do you recall? A. Well, first of all —

Q. Well was that the situation? A. Well, you refer to this as a high school trip, and I don't think it ought to be categorized as such.

Q. Did you tell us, sir, with regard to your Marion Street trip with Frankie Moran that the three fellows that were there serving or running the joint, that they were good friends? A. I would say they were friends of mine.

Q. Then I'm asking you again, sir, who—we know, I think, that Shorty Glaude is dead. Who were the other two? A. I don't know, but I'll tell you this, that during a period from probably late grammar school through most of high school, in those days we didn't have all these organized [111] baseball teams, Babe Ruth leagues, and all that. We organized

our own teams. We had one up in my neighborhood, and among the opponents that we would play periodically were a group of boys from what everyone on the west side referred to as "down the hill" as opposed to "up the hill". This is the more or less triangular plot that is Main, McGregor south, McGregor north, and in there. They would come up. There was no field in that area on which to play any kind of a game. We played in this Mahoney Park that has been referred to and in the old Amoskeag field, which is now all built up, but this would be between Youville and Reed. There was a cleared area there. And I like to remember that we most of the time beat them at the sport that we were playing, but sometimes they beat us up. They were, you know, rather rugged boys. We got to be friendly with them on this basis. I ran into one of those fellows very recently. I don't know his first name. His name is Hudson. That's his last name, but I don't know what his first name is.

Q. "Hudson"? A. "Hudson". There were Shorty Glaude, a Bill Vallaincourt, who later became a star athlete at West and later went to Berlin High School. There was a Dover Duval.

[112] Q. "Dover Duval"? A. Well, I don't know what his first name was. Well now, at a later date — you know, I used to see these fellows. A normal evening, in the summertime especially, would be to walk from my house and get to the shoe shine parlor that was next to Al Gosselin's drug store at the corner of Main and Amory.

Q. "Down the hill"? A. "Down the hill". And we would see these fellows that we had played with or against, you know, a few years ago, or not too many, a year or two ago sometimes. And they would talk about their friendship with and interest in Al Roy.

They were proud of him, as I was.

Q. What was it that you were proud of him about?

A. Well, he was quite a fellow on the west side. He won an aldermanic election from this other fellow that most of us, or our parents, were glad to see happen. He was a kind of a hero in the area. And these fellows, you know, talked about that they were connected with Al in his enterprises.

Q. In what enterprises? A. Their liquor business.

Q. Now, what you're telling me now, sir, if I understand you [113] correctly, is that after Roy was an alderman from Ward 12, as you're standing around the corner down at the foot of the hill, the Amory-McGregor Street area — Amory and Kelley Street? A. Amory and North Main.

Q. Amory and North Main — that you young fellows standing around there talking, these tougher boys from down the hill indicated to you that they were working along with your hero and their in the liquor business. Is that what you're saying? A. You're over-simplifying it.

Q. I'm trying to get specifically before this Court and jury what you say this situation was, sir, so that we can then go on with the rest of the case. Is that what you're saying?

Mr. Reynolds: Objection. Would you let Mr. Scott explain his previous answer?

Mr. Brown: Go right ahead, Mr. Scott.

A. Let us put it — let me put it this way: That they went out of their way to leave that strong impression.

Q. You mean they didn't actually say this? A. What the specific words were — and I'm not so sure whether we spoke English or French. This is, you know, thirty-five, [114] forty years ago. Most of these kids spoke French. They were French kids. And I spoke French. I speak French fluently. So I can't tell you whether it was in French or English or what the specific words were, but that the information was communicated to me.

Q. That these boys were in the liquor business, these

young boys were in the liquor business? A. That they were involved in this business, yes.

Q. In what business? A. Liquor business.

Q. Where? A. In this area down the hill.

Q. Where down the hill, the Marion Street joint? A. Well, you know you put much stress on a Marion Street location.

Q. Am I doing that improperly? Isn't that what you told us at the deposition? A. I told you about that in connection with a specific incident.

Q. Didn't you also tell us, sir, that that Marion Street place was the place these boys were talking to you about and that they were close to Al's? A. Yes.

[115] Q. That's with reference to the Marion Street joint, isn't it? A. Will you ask that question again, please?

Mr. Reynolds: I wish he wouldn't. I object. He's cross examining.

Q. [By Mr. Brown] Mr. Scott, you and I have been making a lot more progress in a shorter period of time than I expected, but am I correct or am I incorrect that—and I'm talking of what you told us at Page 20 of the deposition. Let me just give you Page 20 to refresh your recollection.

* * *

[117] Q. ... Now, let me ask you again, Mr. Scott, in what you told the jury about the boys from down the hill saying that they were with Al in the bootlegging, actually, [118] you were referring, were you not, to the Marion Street establishment? A. Not necessarily.

Q. Isn't that what you told us at the time of the deposition? A. That I was referring to the Marion Street —?

Q. Yes. A. Specifically?

Q. Didn't you tell us something about you knew it was Al Roy's, just like you knew that Moreau's was Moreau's? Do you remember? A. Yes.

Q. Weren't you talking of Marion Street? A. Only as regards the incident with Frankie Moran.

Q. Well, Mr. Scott, you have told us about the Moran incident and Marion Street. You told us in the deposition that location was over the Chinese laundry in the same block? A. The same block.

Q. You've also told us in the deposition about Bourque on Alsasce Street? A. Yes.

Q. Didn't you tell us that this information that the boys you used to play ball with, they were talking about, was the operation at the Marion Street location? [119] A. Not restricted to.

Q. What other location other than the Marion Street location? A. I couldn't tell you all the locations.

Q. Well, was there any other location that you had in mind that Al Roy was supposed to have anything to do with? A. In this area, yes.

Q. Where? A. Well, look, I didn't keep track of these, but this sort of thing didn't continue for very long in any one location. There were movements around.

Q. Oh, there were movements? A. Pardon?

Q. Mr. Scott, were you, at any point in time during Prohibition, were you an agent or an informer for the enforcement people? A. No.

Q. You were not. Was there, to your knowledge, an enforcement group working over the bootleggers on the west side? A. Oh, yes.

Q. And you now say that you understood there was a speakeasy, or something over there of that nature, that was Al's; is that the situation?

Mr. Reynolds: Well, I'm going to object.

The Court: Do you want to change the form of your [120] question?

Mr. Brown: Yes, your Honor.

Q. [By Mr. Brown] Is it your testimony now, Mr. Scott,

that in addition to these specifics which you mentioned in your deposition, is it your testimony now that Alphonse Roy supposedly had a liquor operation over there, the location of which was moved from place to place; is that what you're saying? A. No, I'm not saying that, and I'm in no position to say anything of the kind. I was not Alphonse Roy's keeper in those days. I didn't follow him around and find out where he was operating from at this particular moment. I, you know, lived a reasonably normal life. I had other interests.

Q. Mr. Scott, in the deposition, Page 20, didn't Mr. Guenther as you this question:

"Well, what I am getting at is that your understanding that the Marion Street location that you mentioned was a business run by Roy is based on what you heard from others?" That questions was asked? A. Yes.

* * *

[123] Q. ... What I'd like to have you read it for, Mr. Scott, I want you to tell the Court and jury whether the reference to what the boys were saying with regard to Roy, whether it was with respect to his operating the Marion Street location. Now, would you read what you said previously and then tell me whether or not that is so? A. [Witness complied]

Q. Which way do you want to leave it, Mr. Scott? Were they talking about the Marion Street place or not? A. I haven't completed reading this. I had to refer back to Page 19 to determine who the "he" was that was mentioned in the question.

I'm sorry.

* * *

[124] The Witness: I have read it.

Q. [By Mr. Brown] My question is, which way do you want to leave it? Were they talking about involvement in

the Marion Street location or something else? A. We're talking about the conversations —

Q. With the boys on the corner that you say were so happy that they were with the hero. Were they talking about Marion Street or something else? A. Marion Street, but not restricted thereto.

Q. But Marion Street? A. I would — yes.

Q. All right. A. Look, I want to qualify that, that first of all I doubt very much if I said, "Now, look, what I'm talking about, boys, is Marion Street, this Marion Street location." [125] This happened, you know, thirty-five, forty years ago. I couldn't be that specific.

Q. Do you claim also to know something about a taxicab operation involving liquor that supposedly involved Mr. Roy? A. I heard later about this taxi business, but I don't know much about that.

Q. You do not want to take a position that you know anything about that situation; right? A. Right.

Q. Now, was there a situation of a courier bringing alcoholic beverage up to your father's garden plot? A. Yes.

Q. Now, which way do you want to go on that one? Does that involve Alphonse Roy? A. They were people who were either supplied by him or worked for him, according to my father, Joe Minnegan and some other men.

Q. You said your father and who? A. There was a Joe Minnegan was one of them, but there were several men who had gardens down there.

Q. And from what location was this "rushing the growler" going on? From where back and forth? You said there were couriers, I think, in the deposition. Where abouts was [126] the source of supply, Marion Street again? A. I have no idea.

Q. Didn't you tell us on the deposition that either they were getting it from Roy's place on Marion Street or another location? You recall? A. They couldn't —

Mr. Reynolds: Objection to the question, whether he recalls what he said on the deposition.

Q. Do you recall where your understanding was that this alcohol was coming from?

Do you want me to show you what you said in the deposition? Would that help? A. Yes.

Q. I think you'll see it right here at the top of Page 19.

[Shown to witness]

A. Yes. I said Marion Street. And again, I wouldn't necessarily restrict it to that.

Q. What you told us under oath at the deposition was the fellows would bring it up from Marion Street unless they didn't have any at Marion Street; right? A. Or unless they moved across a back alley or something. I didn't keep track of this, you know. This was not my business at the time.

[127] Q. I understand, Mr. Scott, but in your answering in this fashion now you are changing from what you told us in the deposition; correct?

Mr. Reynolds: That's not so. I object. I think the best evidence is this deposition, which I'll show the Court.

Mr. Brown: I'll offer Mr. Scott's deposition in evidence, the whole deposition.

Mr. Reynolds: May I ask on what basis?

Mr. Brown: On the basis the witness has said his deposition testimony was the truth, that he has no desire or design or intention to change it.

Mr. Reynolds: Well, is this to be a new substitute for witnesses appearing in court, your Honor? I object.

The Court: I will sustain the objection.

Q. [By Mr. Brown] You recognize, Mr. Scott, that we have some of the surviving members of the police force who were active at these times over there that have been sitting here listening to your testimony? A. I saw Mr. Suosso here yesterday and today, yes.

Q. The time that you say that the boys on the corner were [128] talking about they were in with Alphonse was after Alphonse had been elected alderman. That was the reason that he was held in some esteem? A. I would presume this. He was quite a fellow in the neighborhood.

Q. Well, you told us at the deposition that he licked his own landlord for alderman? A. Yes. Well, I don't know that that happened before or after these incidents. I can't be sure of that.

Q. Oh, now you think maybe these incidents were before that? A. I don't know. I don't know.

Q. All right. A. Mr. Brown, when I was living through this period of my life, I was not keeping a day by day diary of the events that were taking place. You know, I was hoping to go to college. I was trying to get reasonable marks. I liked to play ball and skate, you know, do the things that normal boys do. In other words, I did have other interests. But I also was awake and alive and alert, and things that were happening under my nose I observed.

Q. Now, let me change the topic of conversation. With regard to Sullivan, Frank Sullivan, filing in 1960, do you claim to know something about whether or not he was paid for [129] filing and who paid him? A. All I know is this — and again, I don't know the dates exactly. I was on my way to Ferretti's. I might mention —

Q. On Elm Street? A. Yes. I'm the shopper in our family. I relieve my wife of that chore. I had left my office, and I was on my way to Ferretti's. I got up to, you know, about to the State Theater. There's a crosswalk there, and there was Frank Sullivan, right in Elm Street, and I knew of his filing, or announcement, one or the other, and I says, "Well, I see you did it again, Frank," and he said something or other. He seemed a little incoherent — not incoherent but, you know, thick-tongued.

Q. You think he may have been under the influence of

liquor at the time? A. Mildly probably. And I said something along the lines that "You ought to be ashamed of yourself."

Q. He ought to be ashamed of himself? A. Some such thing. At which point he pulled out a roll of bills and said, "Well, see what I got for it," and he dropped some. I helped him pick a bill or two up.

Q. What denomination bills were these? A. I didn't observe.

[130] Q. How big a roll of bills are you talking about? A. A substantial roll of bills.

Q. Well, as big around as a man's fist? A. Yes, but I don't know how tightly — I did not go over to that man and say, "Now, here, give me that money. I want to measure the size of the roll and look at the denominations and take the serial numbers because I might have to tell somebody sometime." I didn't do that. If I was walking and I saw you drop your pocketbook, I'd pick it up and hand it to you. I wouldn't ask you what was in it.

Q. Was there anybody that you can give us the name of who was a witness to this situation? A. I don't know if there were any witnesses.

Q. No witnesses at all? A. I don't know if there was anybody who witnessed this. It was on Elm Street.

Q. What else do you say Frank Sullivan told you on this occasion? Tell us the rest of it. Get it all out. A. That he got paid for filing.

Q. Tell us all of it. A. From Roy.

Q. That Alphonse Roy was the one who paid him? A. Yes.

[131] Q. That's your testimony here under oath in this court? A. Yes.

Q. You must have known this before the Ballot Law Commission hearing, didn't you? A. I don't know whether it

was before or after or during the Ballot Law hearings that this occurred.

Q. And you didn't tell Mr. Millimet about it? A. No, I didn't. In fact, I'll tell you, I was a little miffed at not having been called, you know, to participate in that hearing, but I didn't see very much of Joe Millimet during that period. This whole Hill campaign got started at a meeting up at Judge McLane's place on Newfound Lake. Later — at that time there was talk that Joe Millimet would be his campaign manager, and I suggested, or somebody else suggested, "You're going to do the work." I said, "Well, you know, I've got my business to tend to, but I'll certainly do what I can," because I felt very strongly about Herb Hill. Now, when this thing got into some kind of operation, I was asked by somebody — and it might have been Joe. I'm not sure — "We want to have a luncheon meeting in Nashua, at which time we'll try to get people to contribute to Herbert Hill's campaign. Not financially, but get them involved." I got ahold of Mayor Vagge and a [132] day was set and we had the luncheon. Mr. Hill appeared and spoke to them and solicited their support. From that point on, my involvement or interest in this campaign seemed to be diminished. They didn't seem, you know, to need me very much.

Q. Mr. Scott, is it your testimony you didn't tell anybody about this situation of Sullivan pulling a big roll of bills out of his pocket and telling you Alphonse Roy paid him for filing? You didn't tell anybody? A. Oh, I must have told someone.

Q. Who? A. I don't recall.

Q. Who? A. I don't recall having told any specific individual, but I wouldn't be at all surprised if I told several.

Q. Who? A. I don't know. I said I don't recall everything —

• • •

[134] Friday, December 9, 1966
10:00 a.m.

* * *

Direct Examination

[Continued]:

Q. [By Mr. Brown] At the close last evening, Mr. Scott, I asked you whether you told anyone else about this discussion you had with Frank Sullivan when he pulled the roll of bills out, spilled them on the street, you helped him pick them up, and he said Al Roy had paid him. Did you mention that episode to Mr. Pearson? A. I don't think so.

Q. Had it occurred before you talked with him? A. Pardon?

Q. Had it occurred before you talked with him? A. I don't know.

Q. Are you any better able this morning than yesterday to tell us when this first telephone call with Mr. Pearson took place, as to dates? A. No. You see, I didn't make any notes. I'm relying on my memory as best it will serve me as to these dates and times.

Q. Well, we're going to help you on a couple of them. A. All right.

[135] Q. The Manseau funeral was in 1943, wasn't it, Mr. Scott?

[Witness handed paper]

A. That's what it says.

Q. It couldn't occur until the man died?

Mr. Reynolds: I couldn't hear, Mr. Brown.

Mr. Brown: I'm sorry. I suggested the funeral couldn't occur until after the man died.

Mr. Reynolds: True — what man?

Q. [By Mr. Brown] What's the document I gave you that will help you on this date, sir? A. "State of New

Hampshire, County of Hillsborough, City of Manchester —"

Q. Death certificate? A. Death certificate.

Q. When did Mr. Manseau die? A. April 22, 1943.

Q. And George Norman, when did he die? A. May 21, 1938.

Q. So that the two occasions associated with the wakes were about the dates shortly after the death of the two people; correct? A. Yes.

* * *

[140] Q. Well, Mr. Scott, do you say that you have now told the Court and jury in substance the total of what you told Pearson with regard to the content of that article? A. To the best of my recollection, I do.

Q. Now, Mr. Scott, you have read the article? A. Yes.

Q. And you are aware that the statement is made in the article that Mr. Roy was a former bootlegger? A. Yes. But I'd like to have that article, if I may, please.

[Submitted to the witness]

Q. An article of that nature, Mr. Scott, being circulated in four of the newspapers in the state, would have a tendency to injure the person — Roy — being discussed; correct — in your judgment? A. I don't know.

* * *

[142] Q. [By Mr. Brown] You did discuss the article with other persons after it was printed? A. Yes.

Q. And you do know it was discussed generally in this area at least, that is, the Manchester area? A. Frankly, it didn't make any great impact. As a matter of fact, somebody showed this article to me several days after it had been published in some paper. I don't know which that was. And it was at that time that I learned about Ralph Lavallee's name.

Q. But the article was being discussed in the community

after it came out, although it wasn't published in the local paper? A. I don't know how much it was discussed.

Q. Didn't you tell us in your deposition that you did know that it was discussed generally in this area? Page 34, sir. A. Which page?

Q. 34. The one I just asked you to review. A. I said it was discussed very generally in this area and I'm [143] sure I discussed it with several people.

* * *

[144] Q. Just one other thing and I'm going to let Mr. Reynolds satisfy his interest in your testimony.

When you told Pearson, when you told Pearson that Roy had been a bootlegger, did you tell him that it was a fact known to you that this was so, or did you tell him that there was a rumor to that effect? Which way did you tell Pearson? A. That it was a fact.

Q. That it was a fact? A. Yes.

* * *

[145] TESTIMONY OF WALTER C. SUOSSO

* * *

Direct Examination

[By Mr. Brown]

Q. What is your name? A. Walter C. Suosso.

* * *

Q. From sometime in the late '20's until you retired, what was your line of work? A. Well, I was a policeman and detailed most of the time to the liquor squad.

Q. And what was your rank in the department when you retired? A. Lieutenant.

Q. Lieutenant, when were you first assigned to the liquor squad? A. On January 2, 1923.

Q. And how long were you active on the squad, all the

way through until repeal? A. Well, I was on the squad from January 2, 1923, until March 1, 1923; and then the squad was dissolved and reassembled with different personnel on the 17th of [146] November, 1923, and from November, 1923, until July 1, 1950, I did various work on the liquor squad, on the bookie squad, chasing lottery tickets and horse bet races, and I had the fingerprint department for quite awhile; and I was off and on on the squad continually from 1923 until July 1, 1950.

Q. Lieutenant, on your own knowledge, was Alphonse Roy ever charged in court with either keeping, selling, transporting alcoholic beverages? A. Not to my knowledge.

Q. While you were active on that squad — that was the vice squad actually. You had not only bootlegging but other criminal investigation within the city? A. We had everything.

Q. During the time, sir, that you were on that squad, did you ever have occasion to search Alphonse Roy's property?

* * *

A. Search his what?

Q. His property. A. His property?

Q. Yes. A. Well, we searched—we searched a near beer saloon at [147] 405 Main Street under the name of Manuel Roy, his brother.

Q. You searched his brother's establishment on one occasion? A. Yes.

Q. Did you ever search Alphonse Roy's premises at any time? A. Well, that's the only search we made where he was concerned, to my knowledge.

Q. All right. Do you recall the date of that search of Manuel's place? A. January 8, 1923.

Q. Lieutenant, you have the Chief bringing the diaries down. He's supposed to be here at this point. They per-

haps were delayed, but they're going to be here. Can you from your memory advise the Court and jury what the situation was on January 8, 1923, when you searched Manuel Roy's place of business? What did you find? What was the situation? A. Well, there was a complaint that they were selling liquor at 405 Main Street, and Officer Chapman, who was dressed in working clothes, was sent to the saloon to try to buy some liquor, and I wasn't in there at the time of the purchase; but as a result of this search, Oscar Pratt was arrested, Manuel Roy was arrested. Oscar Pratt was arrested for selling liquor. Manuel Roy was arrested for keeping liquor for sale. Alphonse Roy was arrested for [148] interfering with an officer. We found two-thirds of a half pint of liquor, and there was a copper kettle, or a copper funnel, and two glasses were confiscated at the time.

Q. On that occasion, Officer Guiney was on the raid, you were on the raid, Chapman, Bill Moore — was there anyone else? A. No. There was Inspector Gorey, Officer Chapman, Officer Guiney, Officer William Moore, Jr., and myself.

Q. And the rest of you fellows came in after Chapman made the purchase? A. Yes, sir.

Q. And got the evidence that you just listed on the premises at the time? Yes, sir.

Q. And the charge for keeping liquor for sale was against Manuel Roy, not Alphonse? A. That's right.

Q. And the charge for selling was against Oscar Pratt? A. That's right.

Q. Now, do you know whether the charge against Alphonse Roy for interfering with an officer, do you know whether that was ever brought forward in the court? A. It never went before court. He was let go. The following day at court Oscar Pratt was fined fifty dollars and costs. [149] He plead guilty. And Manuel Roy plead guilty

to keeping for sale, and he was fined a hundred dollars and costs. But Alphonse didn't go before court.

Q. And let me ask you this, Lieutenant: Was there any further record with regard to Manuel Roy after you nailed him on that occasion, do you recall? A. Well, not that I had any connection with.

Q. And with the exception of that one occasion when Alphonse was arrested and taken to the station that you've told us about, to your knowledge, was Alphonse ever arrested on any charge? To your knowledge? A. Well, not that I had anything to do with. I don't know about the rest of the police records.

Q. All right. As a thorough police officer, Lieutenant, after this occasion on January 8, 1923, when Alphonse was at his brother's place when you raided it, did you keep an eye on Alphonse from that point on? A. Well, I can't say that we kept an eye on him, no.

Q. Well, didn't you tell me that from the point of view of investigation that you were alert to whether or not Mr. Roy, Alphonse Roy, had any connection with the bootlegging on the west side after that? A. I had no dealings with him.

[150] Q. Well, what I'm getting at, sir — let me ask you this way: If he had been, would you probably have learned of it?

Mr. Reynolds: I object to the form of the question.

The Court: Sustained.

Q. [By Mr. Brown] Lieutenant, all I'm trying to get at is this: Gorey's dead. Guiney's dead. You're actually the senior man still alive that was on that squad at that time; isn't that so? A. The only two alive that were on that squad is William Moore, Jr. and myself.

Q. Now, all I'm trying to get at, sir, you fellows were actively attempting to enforce the law with regard to bootlegging throughout the city? A. That's right.

Q. And Route 1 over here was the subject of investigation, and you were actively attempting to enforce that law in that area, weren't you? A. You said Route 1, did you?

Q. Well, over on the west side, in the area of Main Street, Marion Street — that whole west side, Ward 12 generally. You were attempting to enforce the law? A. Yes. That's right. We were enforcing the law all over the city.

[151] Q. I understand. A. This particular saloon at 405 Main Street was on Route 1 in the police roster.

Q. What I'm trying to get at, sir, we've had a witness testify that Alphonse Roy was supplying a bootlegger on Alsace Street, that he had a second-story joint over a Chinese laundry on Marion Street, and that it was well known that Alphonse Roy was the fellow who was running the bootlegging over there. Now, if that were so during this period, wouldn't you have known about it? A. I probably would have.

* * *

[153] Q. [By Mr. Brown] How many complaints, how many complaints were made that came to your knowledge while you were on that squad, how many complaints were made of Alphonse Roy? A. I had none of my knowledge.

Q. Lieutenant, as the squad was operating in those days, if there had been any complaints to other members of the force, or assigned to other members, would you or would you not probably have heard about them, the complaints? A. Well, on the squad at that time Inspector Gorey was in charge, and any complaints that came in, as a rule he received them, and we acted on them according to what he wanted done.

Q. But I say, if there had been any complaints against Alphonse Roy, would you probably have known about them or not? A. If I had heard about it, I would have known it.

Q. At the request of Mr. Reynolds, Lieutenant, a few weeks [154] ago, did you search your memory, did you search your memory as to whether there were ever any complaints against Alphonse Roy? Did Mr. Reynolds ask you to do that? A. Yes.

Mr. Reynolds: I object to going into my conversation with him in terms of the word "complaints", and I don't know what that word means, and I don't think I ever used it. I think if he wants to relate his conversation, maybe that's something different.

Q. [By Mr. Brown] And in order to satisfy yourself as to the accuracy of what you were telling him, did you ask Chief McGranaghan to dig out the old diaries for the period? A. I recited for Mr. Reynolds that I couldn't testify or tell anything about what happened 43 years ago unless I could refresh my memory and to do that we'd have to see the diaries.

Q. And did Chief McGranaghan locate your diary for the period? A. Yes, sir.

Q. And you did look the diary of that period over? A. Yes, sir.

Q. And the January 8, 1923 episode was recorded in the diary? A. Yes, sir.

[155] Q. And was there anything else in the diary that you examined indicating any involvement of Alphonse Roy in any bootlegging? A. No, sir.

* * *

[158] Q. [By Mr. Brown] Lieutenant, this one that's been marked "17-A" has your name on the outside and on the inside. Is this your diary? A. Yes, sir.

Q. And you have personal knowledge of the matters that are reported in it? A. Yes, sir.

Q. And so far as you're aware, everything that is in there is accurately recorded by yourself; is that it? A. Yes, sir.

Q. Under the date January 8, did you record this raid on Manuel Roy's soft drink place? A. Yes, sir.

Mr. Brown: Your Honor, I offer Lieutenant Suosso's diary in evidence.

The Court: The identification may be stricken.

* * *

Mr. Brown: [To the jury] Mr. Foreman, members of the jury, under date of January 8, with the top of the page marked "Liquor Squad", the entry is as follows: "Searched [159] Philip Dostie, #48 Concord Street. 4 of us. O.K. lot of Mt —"

* * *

. . . cans in shed. John Doe, #1037 Elm Street, room 125. John Doe, #1037 Elm Street, room #84. OK. Searched Manuel Roy's soft drink place #405 Main 2/3 of a 1/2 pint. 1 - 1 gal. copper measure. One copper . . ."

* * *

. . . Funnel. . . . ". . . 2 glasses. Arrested Manuel Roy, keeping for sale. Oscar Pratt, selling. Alphonse Roy, interfering with an officer. . . .

* * *

[160] Q. You keep an index in the back of the book? A. Yes, sir.

Q. Indicating what individuals were involved; is that right? A. That's right. And the disposition of their case. Some of that is abbreviated, but I can explain it.

Q. Well, we find Oscar Pratt right here — "selling"? A. Selling liquor. "L" is an abbreviation for "liquor".

Q. Right. And he was fined $25.00 plus costs? A. Costs of $4.70.

Q. What happened to Manuel? A. And 30 days, suspended.

[161] Q. Right. A. And Manuel Roy was keeping liquor for sale. He was fined a hundred dollars, costs of $4.70, and thirty days —

Q. Sixty? A. Sixty days, suspended. Now, the $4.70 would indicate a guilty plea. There are no witness charges on there. That's just the cost of court, $4.70.

Q. What is the entry on Alphonse? A. Alphonse was let go. He was interfering with an officer, but the disposition, he was let go.

* * *

Cross Examination

[By Mr. Reynolds]

XQ. Mr. Suosso, on that particular January raid, there were Officers Gorey, Guiney, Chapman, Moore and yourself? A. Yes, sir.

XQ. Who was in charge of the squad at the time? A. Inspector Gorey.

XQ. And can you tell me something about the operation? This was a liquor squad? A. Yes, sir.

[162] XQ. And was it the responsibility, at least in January of 1923, of you gentlemen to cover the whole city? A. Yes, sir.

XQ. Not just this area around Main Street? A. No, sir.

XQ. Would you say that this kept you very busy? A. All the time.

XQ. Approximately — well, was there a lot of people dispensing liquor in those days? A. Yes, sir.

XQ. All over the city? Yes, sir.

XQ. Selling it and buying it? A. Yes, sir.

XQ. And there were only five of you to try to keep up with all this? A. Well, there were only four of us. Chapman was only used on that special occasion at Roy's soft drink place. The liquor squad was composed at that time of Inspector Gorey, Guiney, William Moore, Jr., and myself. Chapman was only used on that special occasion.

XQ. Well, in any event, it was a busy period, wasn't it? A. Yes, sir.

[163] XQ. Well, as a matter of fact, January 8, 1923, the day of this raid on Manuel's, that was a Monday? A. I believe it was.

XQ. Before you even got to Manuel's, Mr. Suosso, on Monday — would you call Monday, January 8, an unusually busy day or just an average day? A. That wasn't an unusually busy day.

XQ. On that day, before you got to Manuel's, you searched Philip Dostie on Concord Street? A. Yes, sir.

XQ. Then there was some John Doe at 1037 Elm Street in two different rooms? Is that right? A. Yes, sir.

XQ. And then on the way to Manuel Roy's you stopped and got Michael Schuta? A. We picked him up on McGregor Street.

XQ. That's right near Roy's? A. It's right behind Roy's. Roy's would be on Main Street, and directly east of that on McGregor would be — that's where we picked up Schuta. We picked up Schuta, and he was arrested with a gallon can partly full of alcohol on McGregor Street.

XQ. Was that under his arm? [164] A. Yes.

XQ. Were you on your way to Manuel Roy's at the time you bumped into Mr. Schuta? A. Yes, sir. Mr. Schuta was arrested and booked at 5:40 p.m.

XQ. Well, on your way to Manuel's, you bumped into Mr. Schuta. Then you have to arrest him and call the wagon? A. Yes, sir.

XQ. And then go on into Mr. Roy's; is that right? A. Yes, sir.

XQ. And even after Mr. Roy, that wasn't the end of the day, was it? A. No, sir.

XQ. What happened the rest of the day? A. That particular day we searched Wasyl Maksymic.

XQ. Well, he was arrested and his house was searched?

A. That's right.

XQ. This was your diary of just what you did on Monday, January 8, 1923? A. Yes, sir.

XQ. And you say that wasn't a particularly unusually busy day? A. No, it was not.

XQ. And they have four of you to cover the entire city? A. That's right.

[165] XQ. Do you think you were on the liquor squad from 1923 to 1933? A. Was I on then? Yes, sir.

XQ. You were on until Prohibition went out in 1933? A. Yes. We were on after that also.

XQ. And your diaries covering this Prohibition era have pretty much — many such arrests during this ten-year period? A. Yes, sir. At that time, 1923, I had been appointed to the liquor squad on the second of January, and I had only been on less than a week when we raided Roy's place. After that, after we were on the liquor squad, the four of us, we made a great many more raids than that diary would show.

XQ. Well, how many raids — I don't know whether you call them raids or arrests or what — would you say that you participated in in the Manchester area during Prohibition? A. How many during that period? Well, I couldn't tell you, but it would be several thousand.

XQ. Even with several thousand, do you think you got everybody in the business in Manchester at one time or another? A. What?

XQ. Do you think you arrested everybody that was in the business at one time or another in Manchester? A. Oh, no. There were a lot of them we didn't catch.

XQ. I heard that your squad used to operate in a big Studebaker [166] back in 1923. Was that right? A. I can't tell you the year, but we did operate from a Studebaker at one time.

XQ. Now, I guess I have seen some of these things on

television. I don't know if they were the same in real life. Did you used to all just come in raiding with guns drawn, or how did you — how did you go about making these arrests or raids? A. Well, we'd knock at the door for admittance.

XQ. Well, would you have a policeman's uniform on? A. No. We were in civilian clothes. We'd knock at the door for admittance, and in the early days they very often would unlock the door and we'd go on in and search the place. As time went on, the bootleggers, or kitchen barrooms, they developed what you'd call a peek hole or a small window, and they'd look out to see who was out there, and if it was the liquor squad, police, they would dump the liquor in the sink or the toilet or someplace. And as time went on, some of them developed a steel covering for the door. When we would rap for admittance and they'd look out the window, at times they wouldn't unlock the door, and many times we'd force the door and would rush to the sink or the bathroom to confiscate the liquor.

[167] XQ. You mean they'd try to confiscate it and you'd try to get it before they could? A. Before they destroyed it or dumped it.

XQ. Because you needed that as evidence to get a conviction; is that it? A. I don't hear you.

XQ. You needed to get ahold of the liquor to keep it as evidence to get a conviction? A. You had to have some liquor to prove that they had the liquor there in the premises.

XQ. Well, wouldn't at least you, Mr. Suosso, having been on the squad over a ten-year period, when you knocked on the door, I suppose after awhile you became a pretty familiar face? A. Oh, yes. Very much so. So much so that at times in the neighborhood when we'd show up, the children would yell, "The liquor squad!"

XQ. I suppose it paid off every now and then to have a

new face go in first other than you, Mr. Suosso, that wasn't recognized. Did you ever try that approach? A. That's what happened on this near beer, this soft drink establishment. We used Chapman, who wasn't known, to get in.

XQ. And you say Chapman wasn't known. You mean he was just new [168] on the force? A. Yes. He was a new man on the force.

XQ. And you figured that Manuel Roy or the boys would recognize you and Officer Gorey and Guiney; is that it? A. Oh, yes.

XQ. Now, Mr. Chapman, how did he dress to go in there? A. He was dressed in working clothes.

XQ. What does that mean? A. Well, I think he had on overalls, but I'm not sure, and he was — I believe he carried a wrench and dirtied up his face. He looked like a man just coming from work.

XQ. So this would have been sometime later in the day, 5:00 or 5:30 or so? A. Yes.

XQ. And what happened to Mr. Chapman inside, Officer Chapman? A. What happened to him?

XQ. What did he do when he got inside? A. I don't know. I wasn't in there.

XQ. I see. At my request, did you read Officer Chapman's diary? A. Yes, sir.

XQ. Can you identify this I show you? A. That's Officer Chapman's diary from 1923.

XQ. And this was kept by him as required by the police regulations? [169] A. Yes, sir.

XQ. Well, you say he went in because he wasn't known and you stayed outside because you were? A. That's right.

* * *

[171] XQ. Can you tell me the procedure — going back to this — when somebody such as Mr. Chapman, for exam-

ple, went in in plain clothes, what was the procedure? Was it marked money? What happened in these — A. Very often we used marked money to have them try to purchase liquor. Very often.

XQ. And was that done in this case? A. Yes, sir.

XQ. By Officer Chapman? A. Yes, sir.

XQ. And was he successful in purchasing liquor? A. Well, yes. He purchased liquor from Oscar Pratt.

XQ. And then what happened? A. Well, I can't testify what happened only from reading Officer Chapman's diary because we were outside.

* * *

[182] XQ. [By Mr. Reynolds] Lieutenant, I show you Exhibit 17-B, which is Officer Chapman's diary; and I would ask you to read to the jury the events of Monday, January 8, 1923, relative to the so-called raid on Manuel Roy's, if you [183] would do that, and speak right up, sir. And if it may assist you, I think it begins near the bottom — "We then left there and went to Roy's soft drink place on Main Street." A. [Witness examining exhibit]

XQ. Lieutenant, that's apparently earlier in the day. I wanted you to read out loud, if you would, about going to Roy's. A. "We then left there and went to Roy's soft drink place on Main Street. Arrest: Oscar Pratt for selling liquor over bar. Arrest: Manuel Roy, keeping liquor for sale. Arrest: Alphonse Roy, interfering with officer. At the station Officer Suosso took the number of my five dollar bill and I also marked No. 23 in red ink in upper number 5 and also two dots in lower two fives. I entered Roy's alone and asked for a glass of liquor and also one half pint. I tasted of the glass and gave him the five dollar bill and received $3.75 in change. As I couldn't drink the liquor I held it down under the bar as Officer Guiney came in, and he leaped the bar in the recovery —

XQ. "As they recognized him," maybe, Lieutenant?

A. "As they recognized him. Alphonse Roy then came from behind and tried to break the glass — to knock the glass out of my hand. I then leaped the bar and hit Manuel Roy [184] on the jaw and secured the half-pint bottle one-half full before he could dump it all. We took a two-quart measuring can, a funnel, two glasses and the three men and sent them to the station in the wagon. Arrests were made by Officers Suosso, Guiney, Moore, Chapman and Inspector Gorey. This was my day off."

Mr. Reynolds: I have no more questions.

* * *

[185] TESTIMONY OF ULRIC BOURQUE

* * *

Direct Examination

[By Mr. Brown]

* * *

Q. Mr. Bourque, for a period of time in the 1920's, who was living at 180 Alsace Street? A. I. I did.

Q. You? A. [Witness nodded]

Q. A Mr. Scott testified here yesterday that you, on occasion, had beverages for sale to people, and he also testified that you told him, or he knew that you bought your whiskey, or whatever it was, from Alphonse Roy. Now, I want to ask you —

Mr. Reynolds: I want to object to Mr. Brown before he's even through. Obviously, this question is to impeach Mr. Scott, and [186] for that reason, because Mr. Scott was his witness, I object, unless there's some other reason.

Mr. Brown: Your Honor, I am putting this witness on to prove our case, and in the proof of our case, as I understand my burden, I have to prove what the charge was

that was made and also to prove that the charge that was made was false; and I have put Mr. Scott on the stand not as my witness but in my case in order that the jury might know what the basis for the defamation was; and as I said in my opening, after I had that information before the Court and jury, I proposed to — and I do propose to prove that it is false, and this is one of the witnesses on that issue.

Mr. Reynolds: If the Court please, may I be heard? I think aside from being collateral, it's offered to impeach Mr. Scott; and then further, apparently it's going to be offered to be used against the [187] defendants in this case. Unless this is going to be tied up with the defendants, unless Mr. Bourque is tied up with the defendants, I can't see how it has any legal bearing on the case. And for those reasons, primarily, I move he not be allowed to do this.

The Court: Well, I'm going to allow the witness to testify to the facts, but change the form of your question, Mr. Brown.

* * *

[188] Q. ... Mr. Bourque, when was it that you lived on Alsace Street, number 180? When? A. How long did I live there?

Q. When? What years? A. I don't remember that. It was a long time ago, anyway.

The Court: He doesn't remember, Mr. Brown.

Q. For about how many years did you live at 180 Alsace? A. Five years.

Q. And was this during the period when liquor was not legally for sale? A. I got caught down there.

Q. You got caught? A. [Witness nodded] In 1926.

Mr. Millimet: I'm sorry. Put the microphone a little nearer to him. I can't hear.

Q. You say you got caught? [189] A. In 1926 and '28, I guess.

Q. What dealings did you have with Alphonse Roy with regard to this liquor? A. No, sir.

Q. Did you ever have any business dealings with him at all? A. No, sir.

Q. It's been suggested that you were buying your liquor from Alphonse Roy. Is there any truth to it? A. No, sir.

Mr. Brown: You may inquire.

Cross Examination

[By Mr. Reynolds]

XQ. Can you hear me all right, sir? Can you hear me all right?A. Yes, sir.

XQ. You say you were arrested for keeping liquor for sale? A. Yes, sir.

XQ. In August of 1927? A. Yes, sir.

XQ. As a matter of fact, Lieutenant Suosso was involved, wasn't he? A. No, sir.

XQ. Was this keeping liquor for sale on your own — A. My room.

XQ. A lot of people did that in that era? [190] A. Yes, sir.

XQ. Then on June 12, 1928, you were fined one hundred dollars, second offense? A. Yes, sir.

XQ. Walter Suosso involved in that, do you recall? A. What?

XQ. Lieutenant Suosso, was he involved in that? A. Lieutenant Suosso, yes, sir.

XQ. He arrested you the second time, correct? A. Yes, sir.

XQ. And then did you go out of the liquor business? A. What?

XQ. Then did you go out of the liquor business? A. Yes, sir. That was the last time.

XQ. Had you been in it before 1927 when you were arrested? A. Yes, sir.

XQ. For how long, sir? A. I paid a fine, fifty dollars, the first time.

XQ. Yes, sir. My question — that was in 1927, wasn't it, the first time? A. Yes.

XQ. Well, I wanted to know — Prohibition went in around 1919? A. No, sir. That would be 1926 and '28. something like that.

[191] XQ. When the sale — A. Second time '28, '27.

XQ. When it became illegal to sell liquor? A. Yes.

XQ. Up until that time, it was okay to serve liquor? A. The second time I have to serve time for it.

XQ. Mr. Bourque, what I want to know is, how many years were you involved? A. How many years you want to know?

XQ. How many years were you involved in selling or transporting liquor? A. Two years.

XQ. And those were just the two years that you were arrested; is that right? A. Yes, sir.

XQ. You just started in business when you were arrested? A. Yes, sir.

XQ. And you only lasted until the following June when you were arrested again? A. '28. 1928.

XQ. And then you went out of the business? A. Yes, sir.

XQ. I don't want to get into any confidential information, but I [192] suppose you had suppliers? A. No. No, sir.

XQ. Well, could I ask you this, sir: You were selling some liquor; right? A. Yes.

XQ. And you had to buy it? A. Yes, sir.

XQ. Was it very difficult to — no disrespect to Lieutenant Suosso, but was it very difficult to purchase liquor in Manchester? A. No, sir. I got in in Lawrence myself.

* * *

[1] TESTIMONY OF DREW PEARSON

* * *

Direct Examination

[By Mr. Brown]

Q. Your name? A. Drew Pearson.

Q. And where do you live, Mr. Pearson? A. Washington, D. C.

Q. And have for how long? A. Forty-two or forty-three years.

Q. And you're the same Drew Pearson that has his name on the by-line to the "Washington Merry-Go-Round" or the "D. C. [3] Merry-Go-Round"? A. Yes, I am.

Q. Mr. Pearson, your age is what? A. I'll be sixty-nine on Tuesday of next week.

Q. Well, I hope we don't detain you so long we interfere with your birthday.

Would you be good enough to advise the Court and jury briefly what your educational background was before you started your career in journalism? A. Yes. The early part of my education was in Swarthmore, Pennsylvania. Then I graduated from Phillips-Exeter in 1915. I went to Swarthmore College in Pennsylvania, where I graduated. I studied at the University of Pennsylvania in graduate work, and that was about the extent of my education.

Q. When did you complete your formal education that you just spoke about? What was the date of your getting away from school? A. Well, I graduated from Swarthmore College in 1919. I then took two years out working for the American Service, American Friends Service Committee, in the Balkans; and I came back into the University of Pennsylvania in 1921 and '22.

Q. So that you were leaving your college work at about 22, 23, [4] to actively start your career? A. In 1922, yes.

Though I might—I had actually started newspaper work before that at the age of about fourteen in a very small way, working my way through school with the Philadelphia Bulletin.

Q. As a writer? A. As a part time—what you call a string correspondent.

Q. "String correspondent", as you refer to it, is a fellow who sends in anything that he thinks is newsworthy from the location he's at? A. That's generally correct.

Q. He's supposed to keep the paper informed of things he thinks the paper should know about? A. That's right.

Q. And back in these early days, at the colleges, most of the newspapers would have a fellow at the college giving them that type of help? A. That's correct.

Q. After you started your own career, so to speak, what was your first job? Where did you actually get your start after you got out of school? A. Well, in 1922, after I left the University of Pennsylvania, where I did some teaching as well as graduate work study, I took a trip around the world, working my way as a [5] newspaperman. It took me a year and a half. And then I came back and taught at the Columbia University in New York City for awhile, and then after that I started in active—I went into newspaper work full time with a newspaper syndicate which was called "The United Publishers Corporation News Service". Then I went—then after about two years, I moved to Washington, where I was with the "United States Daily", which is now the "United States News and World Report". Then I worked for the Baltimore Sun, and I've been in newspaper work ever since.

Q. The work with the Baltimore Sun was as a Washington correspondent for that paper? A. A diplomatic correspondent for the Baltimore Sun.

Q. So that if I understand you correctly, Mr. Pearson, your journalistic career, when you decided to go at it full

time, was from the start that of a columnist as contrasted with one of the boys in the news room that is covering city hall on a daily basis or anything like that? A. No. Not entirely. When I first worked for the Baltimore Sun, I was covering the State Department, covering foreign affairs for them, but as a reporter; but then in 1930 this began—well, I worked part of the time with the United States Daily, as I've told you, and in fact had two jobs— [6] what you might call moonlighting, with the permission of both papers, however; and then in 1932 I was fired from the Baltimore Sun for writing a book, "The Washington Merry-Go-Round"—or co-authoring the book, rather—and then I started writing a daily column in the fall of 1932.

Q. Under that name? A. Under the name of the "Washington Merry-Go-Round", yes.

Q. And the column is still marketed and is still captioned by your staff as the "Washington Merry-Go-Round"? A. That is correct.

Q. Some of these newspapers find they can save a little type if they make it the "D. C. Merry-Go-Round"? A. Well, I don't follow the titles in every paper, but that's probably correct.

Q. Getting to 1960, the year 1960, and I'm just going to be a little bit more precise than that, let's get to the summer of 1960, the period, say, from May or June through September. During that period, how much of a staff were you maintaining in connection with the production and writing of the column? A. I had two full time men and one part time man, and I had a secretarial staff of about five girls.

Q. And your operation was physically located in Washington, [7] D. C.? A. That's correct.

Q. How many of these people that you had on the staff, how many of them were writers? A. Well, all the men were writers.

Q. So that there were three of you who actually were writers, yourself and two staff members? A. Well, there was one part time man who was a writer, but he did more research than writing, actually. As a matter of fact, all three of my staff were writers, but they didn't necessarily write for the column. Part of their work was in research, and part of their work was in writing the story, which sometimes—usually I would rewrite. Sometimes not.

Q. In addition to that staff in Washington, Mr. Pearson, did you at this time—talking to this period in 1960—did you also have arrangements with strings? A. I had some, but I've forgotten whether I had any—what I would do, frankly, when a story would be breaking in some part of the United States—I remember a more recent case—I can't exactly remember what happened in the fall of 1960, but recently, for instance, I've had someone covering Mississippi. I would call up the editor of the [8] McComb, Mississippi Enterprise, and he would assign a man down there to help me on a certain story, or on occasion I've gone down there myself. I do have a man, usually, working in cooperation with other newspapers who subscribe to the column. I can call on their managing editors and ask them to help me out on the background of a certain situation.

Q. Well, for example, Cap Langley's newspaper, the Monitor, up in Concord has a fellow by the name of Shenton who does a little moonlighting. Does he string for you? A. No, he does not. But I might say I had another man on my staff at that time, Mr. Lawrence Fernsworth, who was working for the Monitor and who also worked for me.

Q. And Mr. Fernsworth at that time was one of these two men on your staff you previously mentioned? A. No. He was the half man on my staff.

Q. And was he located in Washington or was he out in the field, so to speak? A. Well, he lived in Washington for the most part. He has a farm in New Hampshire, and he

used to spend part or as much of his summers up here as he could. He liked to get away from Washington as much as he could and stay up here, but during the winter time he was in Washington.

[9] Q. Can you advise us, Mr. Pearson, who the individuals were—and I would like to be advised who all the individuals were—who submitted information to you which was used as the basis of that portion of your September 10, 1960 column which is referred to as a "Political Snafu", that is, the comments about the New Hampshire primary situation. Can you tell us who—I'd like to know the total number of people who gave you information. Who were they?

Mr. Millimet: If the Court please, I think the question might confuse the record. I'm sure Mr. Brown doesn't want to do so, but he started out by saying he wanted names of people who submitted information and he wound up by saying "gave information"—

Mr. Brown: I'll withdraw the question. I understand.

Mr. Millimet: All right.

Q. [By Mr. Brown] Mr. Pearson, let me take Mr. Millimet's method as an approach. Who was contacted by you or your staff for information to use? A. Well, in the first place, Mr. Fernsworth submitted a memorandum to me regarding the New Hampshire primary [10] situation in either late August—I think it was late August of 1960. He had been up here in New Hampshire and wrote me a memorandum on the situation and enclosed some clippings from the Monitor, Concord Monitor; and in that memorandum he outlined in general what the situation was and mentioned Professor Hill, of Dartmouth, as the candidate whom I believe was running against Senator Bridges—no, no. Well, anyway—

Q. Well, he ended up running against Senator Bridges and Bridges walloped him. In the primary he had some

other contenders. A. At least he was running for the United States Senate.

Q. That's right, sir. A. I tried to call Senator—Mr. Hill, Professor Hill, at Hanover. To the best of my recollection—it's a little hard for me to remember all of the details after six years, but I think I have—I did take some notes, and I have refreshed my memory from those notes. I was not immediately able to get him. He was out campaigning. I then called the headquarters in Manchester, the Democratic headquarters. I was not able to reach him there but left word that I was trying to get him. Subsequently I did get him. But in the interim, after I had called headquarters, [11] I believe Mr. Scott returned the call.

Q. Mr. Scott called you back? A. Mr. Scott I believe returned my call. I had left word that I was trying to get Professor Hill and left word as to what it was all about, trying to get some additional information on the campaign. He called back. I was not in when he called back, but he talked to one of my secretaries and we had—and he gave her some information appropriate of what I wanted. I then called him the second time and reached him.

Q. Now, where did you reach him, do you recall? A. No, I don't recall, but I have his number. I can give you his number. I forgot to mention that a little earlier, a few days earlier, Fulton Lewis had gotten on the radio and had said that Kennedy was running for President and had given the Democratic campaign up here a large amount of money. I think it was fifty thousand dollars. And I was interested in this because I have tried to make it a specialty of checking on heavy expense funds in any campaign, both Republican and Democratic; and I thought that if this large amount of money went into New Hampshire to any candidate, it was rather important. And [12] Mr. Fernsworth, who was always anxious for me to write about New Hampshire, which was legitimate, because New Hampshire has been

a key state in the primaries, and also Mr. Bridges, whom I knew quite well, was — set the pace for some parts of the Republican Party. So as a result, I think the thing that spurred this call of mine was the Fulton Lewis allegation of the fifty thousand dollars. I think that's what immediately set me off to make these calls, though Fernsworth had written me this memorandum earlier. Then subsequently I talked to Mr. Millimet. I called him. And I subsequently got hold of, I believe, Professor Hill. Very briefly. That was about the sum and substance of it. And my assistant talked to Senator Bridges.

Q. Now, on each of these occasions, Mr. Pearson, starting with the memorandum of Mr. Fernsworth which he worked up for you at the outset, you have written notes as to what you recall as having been the substance of these various telephone calls? A. I have some of the notes.

Q. Well, for example, with regard to Mr. Scott's information, do you have any notes covering what he told you? A. Yes, I have.

Q. And Mr. Millimet? [13] A. Yes, I have.

Q. What about Professor Hill? A. I don't — I may have some notes from him, but I can't quite tell whether they're from him or not. He didn't tell me very much. I think the gist of what he said was he suggested that I talk to — I can't — let me say I cannot remember exactly the order of these conversations. I may have gotten ahold of Mr. Hill earlier, before I called — I'm almost certain that I got hold of him before I called Mr. Millimet, but I can't swear to it for sure, but I think I did. But I just can't remember the order, but I know that I had talked with him.

Q. If you recall, Mr. Pearson, did you have any information given to you by anyone other than Scott with regard to the statement that appears in the column that Roy was a

former small-time bootlegger? A. Mr. Fernsworth may have mentioned that to me.

Q. Where is Mr. Fernsworth now? A. He's in Washington, I believe.

Q. Do you have the memorandum that he worked up for you initially? Was there anything in that on this score? A. I have the memorandum here.

[Produced by witness]

[14] There was nothing in it on that point, as I recall.

Q. Well, have you got any written documentation at all, Mr. Pearson, which would indicate any source other than Scott for your statement in the column that Roy was a former small-time bootlegger? A. Other than what I've just told you, that I think Mr. Fernsworth mentioned this orally to me, but I can't recall at this time.

Q. He mentioned it to you orally? A. That's right.

Q. Was Mr. Fernsworth the member of the staff that Mr. Scott talked to when he talked to a member of the staff other than yourself? A. No.

Q. Do you have any notes — what notes do you have as to what Scott's information was? Do you have those notes with you? A. Would you like to go into this chronologically, with Mr. Fernsworth's memo first?

Q. Well, perhaps that might make a lot of sense. Why don't we? What's the date of the memo? A. August 17th.

Q. August 17th is the initiating date of Fernsworth's memorandum to you? [15] A. Yes.

Q. All right. A. This is entitled "L.F.", meaning "Lawrence Fernsworth" — "New Hampshire politics, August 17, 1960. Democrats have high hopes of carrying rock-ribbed Republican New Hampshire this year. Republican Party split down the middle as the result of antics by Governor Wesley Powell, ex-administrator of Senator

Bridges. The bulk of Republican Party is in a last ditch effort to regain control of the state house. Bridges is keeping hands strictly off in the fight between Powell and former Governor Hugh Gregg for the governorship. Powell has been busy trying to build up a personal machine, throwing out old Republicans from state jobs and putting in his own men. He has only been partly successful. Had ambitions of getting V. P." — vice-president — "nomination but was snubbed by the New Hampshire delegation to G. O.P. Republican convention headed by former Senator Robert Upton. Nixon is sore as" — the next word is "h-e-l-d", but I'm sure he means "H-e-l-l" — "at Powell because last spring when Nixon visited New Hampshire, Powell rode in the first car of a parade at Manchester and made Nixon ride in the second. Nixon felt that at least they could have ridden together. Democratic candidate Bernard L. Boutin, ex-Mayor [16] of Laconia, admittedly has a good chance of being the next New Hampshire Governor, and Kennedy has hopes of carrying the state against Nixon. Much sniping against Bridges. Likely to have a close race, but the miracle of a Bridges upset is unlikely. Concord Monitor of July 23rd clipping herewith." I might say I don't have that clipping. I don't know where it is. "A rock-ribbed Republican paper admits the Democrats have a good chance. It makes these points, that" — the paper makes these points, and then there follow these points — "Republicans grudgingly admit the Democrats might carry the state. Kennedy is a New Englander and a Catholic. New Hampshire is about forty percent Catholic. Many Catholic votes among French Canadians especially in Manchester and in the north, although also Irish Catholic in coastal areas. Among non-Catholic I found" — he was up here in the spring and summer — "I found considerable opposition to Kennedy on the grounds of his religion, adamant opposition to him on religious grounds also

among Massachusetts non-Catholics whom I met. Other Monitor points:" Then he quotes — "More Republicans wrote in Kennedy's name than Democrats wrote in Nixon's in the primaries, indicating a shift of many Catholic Republicans in November. The feeling against [17] Powell in his own party is such that if he is nominated, the nomination will probably result in election of Democratic Boutin. The opposition to Bridges not so formidable. Bridges has a strong Republican appeal and attracts his share of Democratic conservatives. New Hampshire voters have learned how to split tickets. Professor Herb Hill, of Dartmouth, Democrat, is making a hard fight against Bridges and appealing to the snipers in all parts of the state. A New Hampshire voter turnout of 130,000 is likely."

Q. There is nothing at all in that memorandum from Mr. Fernsworth that has anything at all to do with the straw candidate situation or the criminal records of the — of Sullivan and the other two straws, or any comment at all about Roy as a person in the primary? A. That is correct. But you must realize, Mr. Brown, that newspapermen do a lot of their business orally; and although I try to save my memos, I would say that well over fifty or seventy-five percent of my newsgathering is orally, from my staff, from others from whom I collect the news. So that these memos I think are helpful, but they don't cover the whole thing.

Q. Oh, yes. I understand. But I say — my comment was — I [18] am correct, am I not — that in the original memorandum, Roy — A. You are correct.

Q. — and the people in the Democratic primary, any problems they were having isn't any part of the subject matter? A. You are correct.

Q. All right. What is the next piece of documentation that you have, Mr. Pearson? A. The next is a typewritten memo which is from Joe Scott.

Q. From Joe Scott? A. 1008 Elm Street, Manchester, New Hampshire. This is from my secretary, Margaret Leguia, on August 24.

Q. Now, this is a memorandum merely recording information from Scott rather than being a document that Mr. Scott originated and sent to you? A. This, to the best of my recollection, took place after I tried to get hold of Professor Hill and had called the Democratic headquarters in Manchester and tried to get Scott. Now, I'm not positive whether I had called Hill first and he referred me to Scott or not, but I did call both men and wasn't able to get either one of them immediately and had — I don't know. It took me maybe a day or two days.

Finally, Mr. Scott returned the call, and I was out and my [19] secretary made this notation:

"1. Fulton Lewis's column of a couple of days ago said John Kennedy had given Herbert Hill, running for the nomination in the primary for Senate vs. Bridges —"

Q. Could you read it a little more slowly? A. Yes.

Q. This young man we've been working pretty hard this week. A. I'm sorry. I'll begin it over again.

"1. Fulton Lewis's column of a couple of days ago" — I thought it was a broadcast, but it may have been a column. I'm not certain. " — said John Kennedy had given Herbert Hill, running for nomination in primary for Senate vs. Bridges, fifty thousand dollars. Primary to be held on September 13. Though Atty. Joe Millimet is Hill's state chairman, Joe Scott is doing the work and he knows the financial situation." — This was relative to my query. "At present they have less than one thousand dollars. Kennedy has not given any money at all. They have a twenty-six-hundred-dollar printing order and are trying to raise money to pay for it.

"2. Bridges, et al, have run the state for a long time. He perpetuates himself in office by confusing the Dems by

having Irish and French straw candidates. Hill, for the [20] first time, this year contested these candidates and succeeded in having two of four removed. The other two should have been removed but he couldn't get the evidence. Mr. Scott will send you a copy of the Ballot Law hearings." The date, again, was August 24, 1960.

Q. Now, at the time you were getting this information coming in as you're explaining it, you understood that you were getting this information from Herbert Hill's organization; that is, his attorney was Mr. Millimet and Mr. Scott was doing the work. It was Mr. Hill's campaign people you were seeking information from and who were giving it to you? A. I was seeking information from them, and this was in return to my inquiry.

Q. And Scott acknowledged himself to you at that time as being the fellow doing the work for Hill? At least that's what the memorandum said? A. According to this memo.

Q. Millimet may have been the attorney, but Scott was doing the work? A. This is what the memo says.

Q. Did you have another piece of paper clipped to the memo? A. Yes.

Q. And does that indicate the next — [21] A. Yes.

Q. This is something that newspapermen make; right? A. Yes.

Q. Nobody else can read them. Like doctors. Go ahead. What do the notes show, Mr. Pearson? A. Well, these are the notes that I made, that I took, when I called Mr. Scott back. I obviously wanted to talk to him personally and to substantiate what my secretary had taken down and to get further details.

Q. Surely. A. Now, again I want to repeat that when a newspaperman takes notes, as you said, nobody else can read them. Sometimes you can't read them yourself.

Q. Lawyers have the same habit. So this is going to be

Pearson trying to decipher Pearson writing to Pearson? A. That's right.

Q. We'll take your testimony with that understanding, Mr. Pearson. A. But I want to add that you don't always take down everything because you have to go fast and you just — it's a physical impossibility. So what I do in reporting this and other stories, I take the highlights of what's been said, and I can usually reconstruct it immediately thereafterwards.

[22] Q. Surely. A. After six years, it's a little bit more difficult, but I looked over the notes because I knew I was going to testify, so I think I'm fairly familiar with them.

Q. Go ahead. Your interpretation. A. At the top it says, "Hill. History".

Q. He was a professor of history; is that what that means, probably? A. That's what it obviously means.

Q. Sure. A. Now, I don't know what this means. It's "Rep". It should mean "Republican", but Hill is a Democrat, not a Republican, so I don't know what that means. "Filing period lasts five to six days. Robinson" — who was one of the straw candidates — "out. Alphonse Roy in. Real estate man. Withdrew from Congress. Champagne's Supermarket — "

Q. Mr. Champagne ended up being the winner of the Congressional primary that year, so that's a reference to — A. He ran a supermarket, I believe.

Q. Mr. Champagne did. That's correct. That's a reference to Romeo Champagne? A. "Real estate man. U. S. Marshal under Truman. Former bootlegger, small-time. He won the contested election to [23] the House of Representatives against Jenks. Operated close to Bridges. Secured straws for him."

Q. The note there is that Mr. Scott told you that Alphonse Roy secured straws for Senator Bridges? A. That's right. Now, I want to — you will notice this memoran-

dum — and again, my memory may not be correct, but I think it probably is — you notice that the ink is a little bit darker up here than down here?

Q. Yes, sir. A. I think that subsequently I filled this in afterwards.

Q. The portion that says "former bootlegger, small-time"? A. And "Real estate man. U. S. Marshal under Truman." I think this is what I did. Now, going down here, there is: "Roy came from Manchester, the French speaking area. Bridges with McCarthy." Now, I don't understand what I meant by that. Bridges was a friend of the late Senator Joe McCarthy.

Q. One of these straws was named McCarthy too. A. I remember that, and this is more likely what this refers to. "Bridges never had any real, honest-to-goodness opponent." Then the rest of the memo says, "Every time Bridges runs, a Franco-American and an Irishman is in to split the Democratic vote." Then I list below: "Frank [24] Sullivan of Manchester," and then these notes apparently refer to the fact that John L. Sullivan, who was Secretary of the Navy, that this Frank Sullivan being a candidate would tend to confuse the voters with John L. Sullivan, who had run for — I've forgotten whether — I think he ran for the Senate, didn't he, up here?

Q. I think he ran for every office at the top of the ticket. A. And I have a note here that he was defeated by an alleged statement he made: "Let the Frogs jump over the River".

Q. Well, all of this information is the notes concerning what Mr. Scott relayed through to your office? A. I don't think — well, I think he did mention that, but I was well aware of it because I was familiar with that campaign up here.

Q. Well, John L. Sullivan never made the statement. A. I know he didn't.

Q. None of the Republicans said he did. A. He was credited with it, and I have talked with John L. Sullivan about it. At any rate, I'm reporting it as I heard it, as I remember the conversation.

Q. Well, I think most of the jurors know that story. What's the final note on that first page that we're trying to reconstruct? [25] A. Well, I subsequently called — I've drawn a line across here, and this was a separate conversation where I called Ralph Lavallee, in charge of the Grasmere County Farm, as to whether Frank Sullivan had been an inmate there and specifically as to whether Alphonse Roy had telephoned Lavallee asking whether Sullivan would be out in 90 days in time to file, and I asked Mr. Lavallee about the call. I had — I don't remember where I got this information, but I do remember the call very vividly. I wasn't quite sure of the name of the county work farm, but I later understood it was the Grasmere farm; and when I asked Mr. Lavallee, he said, yes, Mr. Roy had telephoned him, and I said, "Well, did he call — did he mention in the conversation that he was calling on behalf of his friend Styles Bridges?" And he replied — these notes said, "Don't want to get implicated in anything like that."

Q. Lavallee — A. This was Lavallee, his reply to me.

Q. He didn't substantiate that? A. No, he did not substantiate it.

Q. Let me ask you right here, Mr. Pearson, because this is the way it came about chronologically, where did you get the information that Roy had called Lavallee that prompted you [26] to call Lavallee to confirm? A. I've been trying to remember that. I don't know. But I do know that I had the information that Sullivan was in this county work farm, and I had subsequently, or I had, I think, before that conversation, I had received — I re-

ceived, I believe, from Mr. Scott the police records — I can't definitely say it was from Mr. Scott. It could have been from Fernsworth. But anyway, I had them. And I — this is the Sullivan record of his many arrests, nineteen arrests —

* * *

[35] Q. . . Mr. Pearson, I have a poor memory, and I like to get as many of these dates as accurately as we can. The date of Mr. Fernsworth's first memorandum to you? A. August 17, 1960.

* * *

Q. And the next thing that we already went over this morning was your girl's note of Mr. Scott's first contact? A. August 24.

Q. August 24. This is Scott calling back; right? A. Yes.

Q. And then do your notes indicate when you then called Scott, your longhand notes? A. My notes don't indicate that, but it was probably within forty-eight hours afterwards, twenty-four to forty-eight hours.

Q. So you say the 25th or 26th? A. Right.

Q. And did we, before the noon recess, completely go over your notes as to what Scott told you on that occasion, or is [36] there something further on the second page of the notes with regard to that call? A. The second page reports—contains my notes on the conversation with Mr. Millimet. The Scott conversation is pretty well covered. The highlights of it have been covered.

Q. If you will bear with me just a moment, you told us that Scott told you when you called him back that there were four straws that had been filed and that the Hill forces had been successful in only removing two of them; is that correct? A. That's correct.

Mr. Millimet: That's in the other memo. That's in the earlier memo.

Mr. Brown: Yes. I think it may be.

Q. Well, which one was it? A. That's in the memo here, but we went into some details. I asked him more about that, and he gave me the names of the different straws—Frank Sullivan, McCarthy and Robinson. I don't have them all in my notes here, but—

Q. And Roy? A. And whom?

Q. And Roy. Roy. Alphonse Roy. A. Oh, yes. Yes.

[37] Q. You also said before recess that Mr. Scott undertook to get you a record of the Ballot proceedings? A. That's what is in this note here, yes.

Q. Well, was the record of the Ballot Law proceedings made available to you? A. I've been trying to remember whether it was or not. I think it was.

Q. We've had marked here, Mr. Pearson, a transcript that's been marked Plaintiff's 12, which was supplied to Mr. Millimet on August 8. Can you tell just by scanning it whether you think you had that, a copy of that transcript? A. I think I did, but I have not been able to find it if I did. I can't absolutely say for sure, but I—the things I paid most attention to were these police records.

Q. That was the other thing I was going to come to. Who did you say it was that supplied you with the police records? A. I believe it was Mr. Scott, though it could have been Mr. Fernsworth.

Q. You have no note with regard to which was the source? A. I have no absolutely clear recollection.

Q. And what police records were supplied to you? Police records relating to whom? A. To Frank Sullivan, Harold P. McCarthy and Clement J. Robinson, Jr.

[38] Q. May I bother you for them for just a moment? A. [Produced documents]

Q. These two pages, sir, are from the Manchester Police Department over the signature of Francis P. McGranaghan, Chief of Police? A. Right.

Q. Was there an additional police record beyond these

two pages that was also made available to you? A. Yes, there was. There was the Commonwealth of Massachusetts, three records from the State of Massachusetts. Do you want me to identify them?

Q. If you would, sir. A. Regarding Clement J. Robinson, Jr., June 10, 1958, in which he is found guilty of drunkenness; and a complaint by Mary I. Robinson against Clement J. Robinson on Jue 7, 1954, for failure to support his wife and three minor children. This case was dismissed, as far as I could see.

Q. Well, Mr. Pearson, let me go back to the Manchester record first. I'm going to show you an original certificate from McGranaghan that I've just taken out of an exhibit for identification. I'm going to ask you to compare your copy with this original, and I'll ask you particularly to note the pencil additions to the original and I want to ask you [39] whether it is perfectly apparent that that Manchester record is a photocopy of the record that I've just given you the original of? A. I would think it was.

* * *

[41] Mr. Brown: I make the offer, your Honor.

* * *

The Court: Plaintiff's Exhibit 18-A and B.

Mr. Brown: 18-A is the document that came from your file and 18-B is the copy that came from Mr. Pearson.

Q. . . . Mr. Pearson, the Massachusetts record that you said you also had, are they copies of these four documents that I show you from Mr. Millimet's file, if you can tell? A. They appear to be copies of the Commonwealth of Massachusetts' three cases against Clement J. Robinson. There is nothing [42] in here to indicate that they are from any one particular file.

Q. But they are photocopies of the precise—whether it's the identical one or not, they have on them precisely the same information that is on the four papers that I

just brought from Mr. Millimet's file? A. As far as I can see from a hasty examination, they are.

Q. And the signature in each instance where the item is verified to be a true copy, can you tell me, does the signature appear to be identical? A They appear to be identical, yes.

Q. Do you want to check another one? A. Yes, that appears to be identical. That appears to be the same. This one is illegible.

Q. You can't tell on the Norfolk County certificates? A. No.

Q. Wouldn't you say from examining them, sir, that probably what you have are copies of these certificates, or not? A. I have so testified.

Mr. Brown: I'd like again to offer as a single exhibit the originals from Mr. Millimet's file and the photocopies from Mr. Pearson's file.

* * *

[43] The Court: Plaintiff's 19-A and B.

[So marked]

Q. [By Mr. Brown] Now, Mr. Pearson, let's go back to your notes at the point that we left off before the recess. You were going to the second page of your longhand notes, and you say these are notes concerning your conversation with Mr. Millimet; is that correct? A. So I believe, yes.

[44] Q. Now, before we go on to those, can you fix that date in any manner? A. No, I can't, except that it was—

Q. After the discussions which were had with Mr Scott? A. My recollection is that it was immediately after the conversation with Mr. Scott, so it would be within—between the 24th and 27th of August, roughly.

Q. Incidentally, Mr. Pearson, we know that it has to be at least that early because Drew Pearson managed to take a short vacation that year, didn't he? A I did.

Q. All right. What do your notes show with regard to

your discussions with Mr. Millimet? A. My notes show that Roy had expenditures of $815.00 with no contributors, no campaign funds contributed; and Sullivan and McCarthy, two of the straw candidates had no visible support and no campaign manager; that the Ballot Law Commission had found that two of them were not bona fide candidates.

Q. And what does the next thing say here? A. And that Professor Hill's forces—this is not all here, but this is—

Q. What it means? [45] A. What was said to me. In brief: "Had tried to kick Frank Sullivan off but had failed." The next one is that Herb Hill filed as the first Democratic candidate, and then a statement that "In New Hampshire anyone who is not French is Irish." I think that's pertaining to the Democratic Party.

Q. If they're not French they're Irish? A. Yes. These are two general groups in the Democratic Party in New Hampshire, the French Americans and the Irish. And that Herb Hill, the last time he ran against Sherman Adams in 1948 came within 11,200 votes of defeating him, and the vote, I noted here, was 115,000 for Adams to 104,000 for Hill. And that in the Ballot Law hearings Sullivan had testified that he hadn't worked for four or five years.

Q. Now, is that the total of your notes concerning your discussion with Mr. Millimet? A. Yes. That's the total.

Q. Have we now gone over, Mr. Pearson, all of the documents that you have concerning the sources in preparation of the article, or are there some more? A. There are some other notes from Mr. Fernsworth on the general situation in New Hampshire, general political situation, but there is no date on them, and I can't recall [46] whether they were before or after this time. They're not really pertinent, except they go into the battles between Gregg

and Wesley Powell and some of the contentions by Wesley Powell that a candidate for public office should not use his staff employed by the government—

Q. In the campaign? A. In the campaign, unless they were chalked up as campaign contributions; and a memo by Louis Wyman, who I believe was then Attorney General, regarding this question of the Corrupt Practices Act in New Hampshire. Now, I don't—this was—and I have a lot of other stuff that pertained to the political situation up here, but this, I think, is the immediate documentation on which I based this particular column.

Q. Well, so far as the charge in the column, the statement in the column, that Alphonse Roy is a former small-time bootlegger, do I take it correctly that you printed that based upon what Scott told you? A. In large part.

Q. Well, you have the actual words that were used on your notes of the conversation you had with Scott; isn't that so—"former bootlegger, small-time"? A. Yes. That's right.

[47] Q. And in the column it's "former small-time bootlegger"? A. That's right. I talked to Mr. Scott about this and asked him some questions about it. He told me that it was a matter of general knowledge, and he also told me about at least one experience that he had had in going into a speakeasy where Roy was there. If I remember, he said there was a little peek-a-boo glass or something where you could look out, and I think he said that Roy's brother was behind the bar and Roy was—Alphonse Roy was present, and he said it was a matter of common, general knowledge.

Q. And you took Scott's word for it? A. Yes. He was very convincing on the point.

Q. Had you had any previous experience with Scott to know whether or not he was a reliable recounter of facts? A. Everything else that he told me stood up, and particu-

larly—in fact, everything that he told me, as I told you, I double-checked with Mr. Millimet. I talked to Mr. Hill. And I had these police records.

Q. Well, the police records don't show you anything at all about Alphonse Roy, do they? A. No, they don't, but you will find in—I'm sure in your business and my business both, that when you establish the credibility of a witness, you can usually depend on it and [48] also, if you find a man has lied to you, you can discount what he says.

Q. I think there's something in what you say. There's an old Latin maxim that sometimes applies: "False in one instance, false in all"—correct? A. Correct.

Q. And you, in your experience, you think that generally is so? A. I do.

Q. Well, did Scott tell you anything about Sullivan, Sullivan telling Scott that Alphonse Roy paid him to file in this—that Scott saw a big wad of bills and some of them falling on the ground, he helped to pick them up? Did he tell you that story? A. I don't recall that. He may have.

Q. He may have told you that? A. I don't recall it.

Q. All right. Did you do any other confirmation work with regard to the bootlegging thing, or did you—you say he was quite convincing. You accepted that as sufficient to publish on that one point, did you say? For example, did Mr. Millimet confirm that there was—that Roy was a bootlegger? A. I don't recall that specifically. My notes do not indicate [49] that I talked to Mr. Millimet about that; but, as I told you before, when you're taking notes, you don't get everything down, and I may well have gone into that with him, but I just don't remember it. And also I don't remember—I think I talked to Fernsworth about this, but I can't absolutely be sure.

Q. Is Mr. Fernsworth going to be available to testify in the trial? A. I don't know whether he is or not. I

haven't seen him for some—he's been off my payroll for a good many years. I might say also that my assistant, Jack Anderson, talked to Senator Bridges about this in a general way; and as you indicated a minute ago, I did take a vacation, and while I did the research on this particular item and take full responsibility for it, nevertheless, you will note that this column bears the name of "Jack Anderson", not my name.

Q. Yes, sir. I understand that. A. And this is because I did take a vacation. And when this happened—I always try to leave some material for the man who is taking my place. On one occasion I asked Senator Bridges if he would write a guest column for me, and in this case we were not having guest columnists. Jack Anderson had to do all the work, so I left him some [50] material. And so he did, however, talk to Bridges, and he told me that Bridges had laughed about this and kind of changed the subject, and Jack inserted in the column—I think it's almost pretty much the way I wrote it except that he—Jack—inserted in the column one sentence, namely: "That sly old Republican"—namely, Bridges—"disclaims any connection with it, but he appears pleased over the muddying of Democratic waters."

Q. Well, Mr. Pearson, what he was talking to Bridges about was the muddying of the waters, as referred to, and not as to whether or not Alphonse Roy was a former small-time bootlegger; correct? A. Well, he was talking about the general situation, yes.

Q. The political situation? A. That's right. He was talking about the fact that friends of Bridges, particularly Alphonse Roy, had put straw candidates into the race.

Q. He was suggesting that to Bridges. Do you have any notes indicating that Bridges agreed that that was factually true? A. I just testified exactly what happened, that Bridges laughed and changed the subject.

Q. Do you say that that is agreeing? A. No. I didn't say that. But after all, Bridges is—or [51] was—a very shrewd politician. I've known him ever since the first week he came to the Senate. I had very friendly relations with him, though I was sometimes critical of him; and he was probably the most astute politician to sit in the United States Senate in my many years in Washington.

Q. Probably astute enough not to be procuring straws in violation of law, don't you think? A. I think that he did procure these straws.

Q. You what? A. I think he did.

Q. You think he did? A. I think he did. I'm convinced of it.

Q. And you think that Roy was a straw? A. No, I didn't say that Roy was a straw.

Q. Well, Scott told you that Roy was a straw You came to the conclusion that Roy was not a straw? A. No, he didn't tell me that.

Q. He told you—A. In the memo to my secretary, she says here—and he may have said this or she may have made a mistake. I don't know. But this is exactly what she has written down, and I'll repeat it if you don't mind—

Q. Go ahead. [52] A. "Bridges, et al, have run the state for a long time. He perpetuates himself in office by confusing the Democrats by having Irish and French straw candidates. Hill, for the first time ever, this year contested these candidates and succeeded in having two of four removed. The other two should have been removed but he couldn't get the evidence."

Now, that does mean, according to this memo, that Roy was considered a straw, but I didn't say that in the column.

Q. I know you didn't say that in the column, but you have testified here that in your judgment you believe that

Bridges actually put these fellows up to it. A. That's right.

Q. That was your belief? A. That's right.

Q. Was it your intention, sir, in this column, to cast that insinuation?

A. Well, my intention was to report the facts exactly as they're stated here and let the reader judge for himself.

Q. But you are an experienced columnist, Mr. Pearson, and when you put in a column twice that Senator Bridges—you put his name in, although he doesn't admit it. As a matter of fact, you say in the column, the column states that [53] Lavallee was asked whether Roy said he was calling for his friend Styles and Lavallee denied it. What is the validity of your putting in a denial of facts unless you're trying to bring what is denied to the mind of the reader? Isn't that what you're trying to do here? A. I was endeavoring to give an accurate report of my conversation with Lavallee, and I think I did. This is exactly what happened.

Q. But why is this denial that Roy said he was calling for Bridges, why is that denial of sufficient interest or importance to get into a nationally syndicated political column? A. Well, partly because of the way Lavallee answered the question. Now, you are a lawyer. You can usually tell when a man's telling the truth. As an old newspaperman, I can usually tell too. Now, Lavallee was, I think, frank with me, but he hedged a little bit on that last question. He said, "I don't want to get into that." He said, "I don't want to get implicated in anything like that."

Q. Do you think Ralph Lavallee actually used those words, that's his expression? A. I'm sure he did because I wrote it down. Exactly. And furthermore, since you've raised the point—may I have [54] those exhibits back, please?

Q. Surely. The records? A. 18 and 19.

Q. Yes, indeed. A. You have to remember that this is an amazing situation, when candidates for the Untied States Senate—and I have made some study of democracy in other countries, from the British Parliament to the Scandinavian Parliament, and I have a very high opinion of the United States Senate, and I think we, on the whole, elect very fine men to it; but when candidates for the United States Senate have nineteen convictions for drunkenness—and here is Frank Sullivan, who, on the year before he ran, which is 19— ran in 1960—in 1959 he was drunk one, two, three, four, five, six times in 1959 alone and sentenced on November 6, 1959, to 90 days in the—"M to Is."—I don't know what that is.

Q. "Mittimus to issue", probably. A. What is that again?

Q. "Mittimus to issue". That is, he has the sentence and he isn't sent up to serve unless he gets drunk again. A. Then he did get drunk again.

Q. Sure. A. April the 18th.

[55] Q. And then they called the mittimus. A. And then they sent him for 90 days in the house of correction. Now, this is not the kind of fellow who runs for the United States Senate. You don't do that in most states of the Union, thank God. I have always had a very high opinion of New Hampshire politics, having spent some time up here myself in my younger days and this to me was a news story, and when I saw the record on this, this was why I called Lavallee. All these reports I'd had from Scott, from Fernsworth, from Millimet, led me to pursue this thing as a newspaperman. And take these other two fellows. Here is Harold McCarthy—"Drunk. Assault. Drunk in house. Drunk, OPMV—operating motor vehicle under the influence of liquor; $75.00, license revoked for sixty days." Again, 1959, three convictions in 1959. "Leav-

ing the scene of an accident; one year probation on condition of restitution." Again in 1959, April, "Assault. $50.00, suspended—" again, "Noise and brawls." Then '59, in October, "Contempt of Court. The Court finds that the respondent has violated the terms of his probation. Continued for sentence on condition that the respondent pay $46.55 before the end of this day toward the damage of the car and the balance in one month.' [56] This is not a man you nominate for the United States Senate or any other public office.

Q. And in your column, sir, in your opinion, you put Alphonse Roy into the same category with the charge that he was a former bootlegger, didn't you? A. I didn't entirely, but I'll come to that in just a minute.

Q. Go right ahead. A. Here is Mr. Robinson, whose violations are not so bad, and yet they knocked him out, but—"Stealing two power mowers in Massachusetts: given a suspended sentence." You don't have fellows like that running for the United States Senate in my recollection and in most states of the Union. Now, here is Roy, who calls up the head of the County Farm, Grasmere, and inquires whether Frank Sullivan is going to be out within time to run for the Senate and then Roy comes in and runs against him. Why does he induce a man—he didn't induce him, but why did he check to see whether he'd be out of the clink in time and then he rus as a candidate against him? Why does he want another candidate running against him? In this case a candidate who obviously has a poor record, because I suspect the people of Manchester knew Frank Sullivan's record. You indicated it just a minute ago when you said "Of course." You knew it.

[57] Q. Well, I know it now, sir. A. Most of the voters must know it.

Q. Please. You're making an assumption—A. No. I'm

acting on your remark to the Court here. You said, "Of course" when I said he got drunk again.

Q. Well, sir, we've been in this Court, you see, for several days, and we've had this information that you referred to before the Court previously. A. I beg your pardon. I take it back. But anyway, let me just go ahead, if I may. Obviously, people around here must have known this man's record, and this made it easier for Roy to split the vote. Obviously these were straw candidates.

Now, you asked me a question that I put Alphonse Roy in the same category of these men. I didn't. What I said was he was a former small-time bootlegger and later United States Marshal. I deliberately put in the word "later"—"later United States Marshal"—because in the old days there were many people who were bootleggers. I know some very respectable big liquor dealers today, millionaires, who were bootleggers, but they've gotten over it, lived it down. . . . Here Roy, apparently, if he became a United States Marshal, it was not held against him but it was a matter [58] of record.

Q. Where was the record? Where was the record? That's what I want to know. Where was the record? A. It was a matter of record in people's minds.

Q. Oh. A. General knowledge.

Q. All right. Go ahead. Go ahead. A. As I say, I did not put him in the same category. I said he had been a United States Marshal later.

Q. Wouldn't you say at least you had damned him with faint praise when you were talking about a man who had served to terms on the Governor's Council, one session as a member of Congress from this district? Wouldn't you say you damned him with faint praise, Mr. Pearson? A. I gave his record here.

Q. You gave no part of his successful record, sir, except for the fact he was a United States Marshal; isn't

that so? A. Well, that's rather an important job.

Q. All right. Now, I want—have you finished? A. Yes, sir.

Q. Now, I'd like to just go back a moment with you, if you'll bear with me. You asked a rhetorical question in this little answer you just gave as to "Why would Roy inquire [59] whether Sullivan was going to get out in time to file?" Now, Mr. Pearson, are you serious when you say you can not conceive of any reason why that question might be asked by Roy other than that he wanted him in the race? Wouldn't you agree, sir, that it might make some difference whether you're going to go into a race or not who your probable opponents are going to be? A. Not in this case.

Q. Not in this case? Then you're satisfied in your own mind that the purpose of the telephone call from Roy to Lavallee was to ascertain whether or not Sullivan was going to be out? A. That's right.

Q. You're satisfied on that point? A. Yes.

Q. Can you be helpful, sir, as to when it was that you made the call to Ralph Lavallee? Do you have any notes on that? A. Well, I have just this one note, yes, but I don't have any time marked on it. I think it was about, almost—maybe a few hours after I talked to—well, it was between the 25th and the 27th.

Q. It was fairly soon after you talked to Scott personally? [60] A. Let me show you this memorandum here.

Q. You are now going back to the first note that your girl made? A. I called all these people up. I think—maybe it was one evening. This was his number—"Hillsborough County, New Hampshire, NA 2-1177". That's Lavallee. This is Millimet's number. At least that's where I got him. "National"—is that right?

Q. Yes. A. "National 5-5413

* * *

Q. . . . So the call to Lavallee, you're satisfied in your own mind, was probably the same two days that you figure for Millimet? A. It was very definitely at that time.

Q. All right. Mr. Pearson, you knew when you were talking to [61] Millimet and Scott that you were talking to Hill political forces? A. Well, I knew I was taking to leaders of the Democratic Party here.

The Hill forces? Herbert Hill's staff? A. If you put it that way, I guess that's about right, yes.

Q. Well, when you had—A. I didn't think of them as Hill forces because Bernie Boutin was in the race too. I was talking to the—what you might call the more modern wing of the Democratic Party.

Q. Well, when you got this information, you called Scott back to be sure you had it right, to get additional detail. You called Millimet to be sure you were getting the information correct. You got the transcript of the Ballot Law Commission proceedings. You got copies of the criminal records on all these other fellows. You had telephone numbers here in town. Why didn't you call Roy to inquire from Roy whether he agreed that these things were so? Why didn't you check out with him? Any reason? A. From long experiences I've found that when you talk to a man, he usually, if he's in an embarrassing position, he usually denies it.

[62] Q. You didn't even give Roy a chance to do that, did you? A. I did not call him.

Q. You made no effort to check it out with him, what you were writing about him? A. I told you I did not call him.

Q. Yes. I know you did. Did you make any effort to check out with him, whether you called him or any other way, did you make any effort at all to check out with him what you were writing about him, whether it was true or false? A. Well, Mr. Scott's word to me, his report to

me was very conclusive, and also the other people whom I have mentioned.

Q. Yes. Did you do anything beyond what you told us to check out whether what they were telling you was accurate or not? A. Not that I recall.

Q. Now, Mr. Pearson, the North American Newspaper Alliance—"NANA", they call it—was distributing this column of yours in 1960? A. No. The Bell Syndicate.

Q. Well, the Bell Syndicate, sir, got merged into and became NANA—or was it the other way around? A. North American Newspaper Alliance is a subsidiary of the Bell Syndicate, but they're entirely independent as far as I'm concerned. The Bell Syndicate was distributing my [63] column, and the Bell Syndicate is the owner of the North American Newspaper Alliance.

Q. Well, you had an agreement, in which you were the author and Bell Syndicate was the other party to the agreement, with regard to circulating the column; isn't that correct? A. That's correct.

Q. And I want to ask you with regard to your relationship with the present name, actually, of the corporate concern, which we understand is "NANA".

* * *

. . . I think Mr. Langley already advised the jury of the various changes that have taken place since then up to now; but when I speak of "NANA", I'm talking about the organization with which you had an agreement for circulating your material. Now, I think the jury, Court and jury, would be [64] interested a little bit in that arrangement. Now, for example, how many columns are you supposed to produce? How many a week? A. How many a week?

Q. Yes. A. Seven.

Q. In other words, it's a seven-day-a-week column, actually? A. Correct.

Q. Under the arrangement, you have full authority to write whatever you please in the column so far as NANA is concerned? It's your decision what the content is? A. It's basically my decision. They give me a lot of helpful suggestions, I guess.

Q. But the agreement is that you write a column of items that you select, seven columns a week, of the same general standard and quality as the "Merry-Go-Round" had before this agreement went into effect? A. That's correct.

Q. And you are the author, on matters of local, national, world events and affairs, economically, politically and otherwise? A. I didn't get the first part of your question. I'm writing those things?

[65] Q. Yes. That's the general scope; is that correct? A. That's correct.

Q. As between you and NANA, does NANA have any right to edit your copy? A. They have every right to propose changes; but if there is a showdown between them and me, my word prevails; but what happens is that when my column moves over the wire to New York from Washington at 2:00 p.m. every day, we have a very good editor in New York who assists at the other end, and he reads the copy over and he makes suggestions practically every day regarding this and that. Sometimes they're minor, sometimes they may be major. If there's a major question involving libel or accuracy, he may take it up with the manager of the syndicate, and — our teletype works both ways — he will teletype messages back to me. I'll teletype messages back to him, and we nearly always work it out without any problems at all. In a matter of this kind, they trust me to look into the investigation of the facts carefully in advance, and I think I justify their trust. Now, in this particular case I was not in the city. Jack Anderson was sending the column, and I do not know whether they raised any questions or not.

[66] Q. But the general situation, Mr. Pearson, is that you put your column on the teletype, it goes into their New York office — A. That's right.

Q. — they then mimeograph, after whatever minor changes may be agreed upon — A. They mimeograph and also put copy on the wire to the West Coast.

Q. In order to save time? A. After any changes, after editing. There's hardly a day goes by but what they don't suggest some changes which are agreeable to me.

Q. In the agreement between you and NANA, NANA, or Bell Syndicate, whatever you want to call it, they're not actually responsible for editing your material, are they?

* * *

. . . What I'm trying to direct to your attention, Mr. Pearson, is that in the arrangement isn't there an indication that the editorial work is not the distributor's but the — but is yours?

* * *

A. I'll be glad to explain that.

* * *

. . . That refers to the cost of editorial gathering and news work. For instance, Mr. Anderson's salary, my assistant, I pay. I pay all of my costs of news gathering — telephone calls, everything. The syndicate is not responsible for any of my editorial costs. If I take a trip abroad, I pay for it, and so on.

[68] Q. Mr. Pearson, what I'm trying to establish, isn't the arrangement actually that the burden of being right on what's in that column is Drew Pearson's, not NANA's? A. Burden of being a writer?

Q. Being right, r-i-g-h-t, is yours? A. Primarily, yes.

* * *

[69] Q. . . . Mr. Pearson, we'll try it this way: Under what circumstances, under what circumstances does NANA undertake to investigate the truth or falsity of factual

material that you put into your column? A. Well, every day their editor reads the column and checks [70] back with me on certain facts in the column. Now, sometimes he may question something, sometimes he doesn't. Almost every day he'll have a few suggestions one way or the other. If there's some major question of which he is afraid has a risk of libel in it, then he will take it up with the manager of the syndicate, the manager of the syndicate will teletype back to me or get me on the telephone, and we will — I will tell him what my sources are, how good they are, whom I have talked to, and sometimes I will change something. Almost every day I'll change something at their suggestion. I think the day that I left Washington, which was — my memory is getting bad because I've been moving around so quickly. Thursday I left Washington, today's Friday, and there was something came up that I changed. I know there was, but I can't remember what it was. But at any rate, if it's a major question, we'll hash it out, and sometimes — frequently I'll make a change at their suggestion, and on occasion I've held up a column for a couple of days so we could go into it further. In any showdown, if I want to exercise my veto, I can do it.

Q. You can insist — A. I have the final veto.

[71] Q. You have a right to insist that it be sent out as you wrote it if you want to take that risk? A. I have, but I don't usually exercise it. We usually have a meeting of the minds. They've had a very good lawyer up there who checks over the column when they're worried about it, and he and I sometimes get on the telephone.

Q. NANA does not, however, undertake to re-investigate your facts; they call you back to discuss it with you rather than going out to do their confirmation? A. That is correct.

Q. They do no independent investigation of the factual material; they merely bring it to your attention and

discuss it with you? A. Well, as far as I know, I think on occasion they do. They may have on some occasions. In fact, I'm sure they have in some, but usually not.

Q. And do I understand correctly that you are unable to tell us whether or not this column was flagged by NANA as being possibly libelous? You have no way of knowing whether or not they did call on it? A. No. I was away on my vacation.

Q. The column that got printed up here indicates that your associate, Jack Anderson, was writing them from the third [72] of September, which I guess would have been the Saturday before this one came out? A. I would think so.

Q. You were on vacation before Labor Day, then? A. I probably started my vacation just before Labor Day.

Q. And when you left on vacation in 1960, did you have columns prepared for some of the days on vacation? That is, did you write a group of columns so that they could go out even though you were on vacation without any further work by the staff? A. Well, I wrote what was a series of stories. For instance, this was a half of the column, and I wrote some stories so they could put them in the column. See, the column is usually not one subject. It's devoted to usually two or three or maybe five or six subjects. So I left them as much material as I could.

Q. Well, when you left, was there any instruction left by you as to when these stories that you left them were — when they were to be placed, when they were to be sent out? A. No. I don't recall that there was. But obviously, if the New Hampshire primary was coming along on the 13th, this story would have had to appear a few days before. We try to time stories, political stories, pertaining to an [73] election, just before the election. In every case.

Q. Why is that? A. because the public interest is greater at that time.

Q. So there was probably a planned release as close to the primary as you safely could be sure to be in the hands of the newspaper on this particular item? A. Well, obviously Mr. Anderson, I'm quite sure, followed our normal practice of getting a story out a week before, or a few days before election. This is what we always do.

Q. So it was intended, so far as you're concerned, to have this particular story hit the readers as soon, well, as closely before the day of voting as practically could be done? A. When you say as close before, one or two days one way or the other isn't too important, except that we never — we try not to put out a story the day before an election.

Q. And why is that? A. Well, because if anybody wants to reply to it, then they've got time to reply. If we put it out the day before, they don't have time to reply.

Q. So applying that philosophy to this article, did you have in mind that this should be printed far enough before the election so that anyone could reply? [74] A. I can't say exactly what was in Mr. Anderson's mind, but he put it out on a Saturday, which is normally not a very good day for readership because people on Saturday don't usually read the papers, especially in September. They're away on vacation. Saturdays and Sundays are the worst days for publication at that time of the year. I suspect he just put this out because he figured it had to go out some time or other and he had some other news for Friday and he just put it out. In the newspaper game, you don't plan these things as carefully — you don't pinpoint a thing for such and such a day. You write it when you can, put it out when you can.

Q. But the next publication day on your newspapers here in New Hampshire would have been Monday — you

realize that — the day before the election? A. Well, I didn't realize it, but —

Q. Well, Mr. Loeb's newspapers are not presently customers, as I am led to understand, and they have the only Sunday paper that is published in the state.

* * *

[75] Q. . . . You say you don't know whether there was any particular design to putting this out Saturday but it would be consistent with the way you would handle this type of story? A. That's correct.

Q. You have no documentary evidence as to whether any consideration to timing was given along these lines? A. I have none.

Q. You wouldn't expect to have any? A. No.

Q. In the arrangement that you have with NANA, Mr. Pearson, you give that syndicate, that group, the exclusive first publication right; correct? A. That's correct.

Q. And you bind yourself not to release anything for publication in the newspaper directly or through any other syndicate or distribution group? [76] A. That's correct.

Q. Under those circumstances, sir, NANA can actually prevent your column from being printed; isn't that so? You have to channel it through NANA? A. I have to, yes, but they can't prevent it from being printed, because that would be in violation of the contract and they would immediately lose their contract rights, which is the last thing they'd do. I've been with them for twenty-five years, roughly. We operate as a team. We're not out to cut each other's throats. We're out to work together.

Q. I understand that, sir. All I'm trying to get at, they are the only outlet — A. That's correct.

Q. — for your material? A. That's right.

Q. And should they decide not to release an item, there's

no other place that you can release it until you have straightened the situation out; correct? A. Well, virtually, yes, though I do write some magazine articles, and I have a radio program every —

Q. Yes, but I'm talking about — the contract is specific as to newspapers only, isn't it? [77] A. That's right.

Q. And, Mr. Pearson, about how many newspapers were buying the column in September of 1960? Roughly how many? A. Well, offhand I would say maybe 550 including weeklies, of which we have quite a few. Since that time, we have more. I should say around 600. Since the Senator Dodd case came along, the number's increased.

Q. Do you have in mind, sir, about what the circulation of your 550 or so customers is? A. I don't have any clear idea about that, because it's very difficult to tell how many people read a newspaper Some people estimate, some publishers estimate that a newspaper goes to a family and three, four, five people in the family read it. On the other hand, the paper may go to some families who won't read my column at all. So I can't tell you. I've heard estimates, but I think most of them are rather valueless.

Q. Well, I'll agree they may be, but in the absence of anything else, I would like your best judgment as to about what the circulation of the papers was that were purchasing the column since—well, let me ask you this: If you don't know that, do you know how many of those papers actually printed this column? [78] A. No. I have no idea.

Q. Saturdays would there be some drop-off because of Saturday, or would they be apt to use it on Saturday because Saturday is a poor news day? A. No. In the middle of the week—I beg your pardon. In the midwest, in the far west, many papers do not publish on Saturday at all. In New York City, for instance—that's not the midwest, but New York City, the New York Post does not

publish on Sunday but they put out a Saturday edition which combines—they usually use our Sunday column and not the Saturday column. It's very difficult to tell you this, because—but Saturday is usually a weak day. Many papers drop their Saturday edition, have in latter years.

Q. Be as conservative as you like, sir. Stay on the low side. What would you say the probable minimum circulation would have been that carried this column; your best judgment? A. Well, I have heard my syndicate manager say that our syndicate circulation is around—readers—is about thirty million. That's his guess.

Q. That's on the basis of readers? A. Yes.

Q. Not the issues of the newspapers?

[79] Mr. Millimet: Not what?

Mr. Brown: Not the issues of the newspapers.

A. Yes. That's right.

Q. To be conservative, would it be fair to say that he may be puffing only a hundred per cent? Would fifteen million be a more reasonable estimate? A. Well, I frankly haven't any idea. Perhaps I should have worked this out, but I just don't know.

Q. You do sell the column, that is, the column is sold here in New Hampshire to others than the Concord Monitor? You're aware of that? A. That's right.

Q. And are you aware that it did in fact get published in the Portsmouth, the Laconia and the Claremont papers that subscribe to the service? A. I didn't know that until I arrived here today. Then my attorneys told me that.

Mr. Millimet: I didn't hear the last question and answer.

Mr. Brown: Read the last question and answer.

[Question and answer read as requested]

Q. Just to be sure I understand the situation, sir, the documents that we've gone over, are those the only documents [80] that you have been able to locate with regard

to the preparation of the column? A. Those are the only ones that figured in the preparation of the column. I told you there's some other background information that I've had over the years.

Q. I understand. The only items that you can say were directly related to this column are the ones we went over? A. Those are the only ones.

Q. Well, I've marked part of them, Mr. Pearson. I'd like to offer all the rest of them. Then we'll at least have them all together.

* * *

[81] The Court: Plaintiff's Exhibit 20.

[82] [So marked]

Q. [By Mr. Brown] I'm trying to get to my last question, but my partners and my associates aren't as tired as I am. They want me to be sure we're not misunderstanding on another point.

On this other background material that you do not consider was immediately used in this column, is there any reference to Alphonse Roy? A. None.

Mr. Brown: Thank you, sir. I think that's all, Mr. Pearson. Thank you, very much.

Cross Examination:

[By Mr. Reynolds]

XQ. Mr. Pearson, do you have a copy of the column in front of you? A. Yes.

XQ. This copy, is this how you send it? Is it in this form or a similar form that it is sent to New York or NANA? A. No. It's sent on telegraphic paper. We have a Western Union—well, actually it's American Telephone & Telegraph Company—an arrangement with Western Union with what we call a leased wire, and we teletype this to New York. It arrives instantaneously in New York, and

we can make corrections on that teletype instantaneously. Then they [83] mimeograph it in this form, which the column runs exactly two and a half pages. This is a little bit long. It's supposed to be about this long. And then they also put it on a leased wire which runs through Buffalo, Detroit, Chicago, Salt Lake City, Denver, to San Francisco, with drop-offs along the way and it's a simple matter. It happens every night, automatically.

XQ. This column— A. But up in Concord they would get this mimeograd. In New Hampshire this would come in mimeographed form, I'm fairly certain.

Q. And normally you write the column how many days before you sent it? A. Three and a half days. In other words, the Saturday column is written Wednesday afternoon.

XQ. Is there any particular format that you write the column? You mention you write seven columns a week. Do you write two columns on political news a week and two on something else? Is there any rule of thumb? A. No. The only format is that there are two columns drawn on Wednesday, one for Saturday and one for Sunday, because we take one day off at the end of the week. And as far as content is concerned, we try to have variety. For [84] instance, in this particular column, half of it is devoted to New Hampshire politics and one-half to the fact that Congressmen, in going home from their sessions, got free junkets from the Air Force and this pertains to South Carolina in large part—Congressman Rivers, of South Carolina; Senator Strom Thurmond, of South Carolina; three Texas Congressmen, one from Michigan, one from Iowa, and one only from New Hampshire, who imposed on the Air Force to go home. So we try to have in the column material which will be of interest to all of our readers. In the first place, the fact that Congressmen use free airplane travel is of interest all over the country. It's

taxpayer's money. And we have specialized on that over the years; and also we've tried to specialize on any irregularities in elections such as heavy campaign funds, and this second story about New Hampshire was more or less a national story because it involved candidates who had police records and were running for, as I said a minute ago, the most distinguished parliamentary body in the world, in my opinion, the United States Senate.

XQ. This, as you say, the reference to New Hampshire, is the second part of your column, if I may call it your column, sir? [85] A. Yes.

XQ. And of the New Hampshire part, one part deals with the Democrats having primary battles and fights and frictions, and the other part deals with the Republicans in New Hampshire? A. That's correct.

XQ. I was referring to the reference to Wesley Powell and Hugh Gregg and the visit by President Nixon, Vice-President Nixon. A. Yes. This column is not especially devoted or aimed at Mr. Roy. Three-quarters of the column deals with the Republican row between Gregg and Powell and other controversies inside the Republican party.

Mr. Brown: Pardon me, Brother Reynolds. I took the trouble this morning to make some photocopies, enough so all the jury could have them, if you want to refer to a specific—

Do you want to give each one of them a copy? It might let them see exactly what you're calling to Mr. Pearson's attention.

[86] XQ. . . . The article makes reference to calling "on behalf of my good friend, Styles Bridges"; and I think it also says something about "Styles Bridges is restirring himself", and then it says "That sly old Republican disclaims any connection with it, but he appears pleased over the muddying of Democratic waters."

I want to ask you this: You mentioned that you had

been friendly with Styles Bridges, and the tone of this might appear to some people as unfriendly. If you could explain this— A: Well, yes. I had been and was friendly with Bridges from probably the first week that he arrived in Washington. His wife was a councilor of my sister's camp in New Hampshire—his first wife—and he's been to my house several times for dinner out at the farm; but in Washington you can differ with people politically and still be friends. In the Senate there are many people who disagree with each other vigorously, but they're friendly; and Styles and I, we disagreed in a lot of things. For instance, he was a [87] Taft man, I was for Eisenhower, and we used to have arguments over that. I had been fairly close to Eisenhower in the early days and urged him to run when he was President of Columbia. But that was just one difference we had. But Styles actually was a very—he was very frank in talking to me. I always found him extremely honest. Some of the things that he did politically, such as this which I testified to a few minutes ago, was politics, and I thought it was not the right kind of politics, but nevertheless, I got along very well. And on one occasion he was a very good witness for me in a libel suit.

XQ. You have mentioned— A. I might say that his wife wrote me a beautiful letter after he died, which I cherish and have here, when she was running for the—about two months after he died.

XQ. Would you read that letter? A. She said: "Dear Drew, I read with a great deal of interest your column dealing with the part the women are playing in the political fate of our nation. I was most grateful for your kind references to me and found the entire column extremely penetrating. Before long I shall communicate my future plans publicly. In the meantime, I send you and Luvie"—that's my wife—"my best wishes [88] for a happy and

healthful 1962. Sincerely, Dolores." I wrote back to her: "Dear Dolores: Your gracious note reminded me that I had been remiss in writing you about Styles' death. While Styles and I disagreed on many things, I considered him a friend. I had known him since the first week he came to Washington as a result of the fact that my sister attended a camp in which Styles' wife was a councilor. Styles was the most kindly and considerate man I have known in the Senate. He would always go out of his way to help even the lowliest and most unimportant friend. It will be interesting to see what happens in the New Hampshire race. I'm inclined to predict that you will win; and although you and I may not agree on some things, we do agree that competition is the foundation stone of American life, both in business and in politics. Good luck."

XQ. Mr. Pearson, other than the late Senator Bridges, have you had any other contacts with New Hampshire? I think you mentioned Mr. Fernsworth, who works for you and also works for the Monitor. What other contacts have you had with New Hampshire? A. Well, I came up here to Manchester—I've been up here several times. I came up in 1948 with the Mercy Train, [89] the French Mercy Train, which was sent by the French people to the American people in gratitude for the—thanks for the Friendship Train, which I'd helped organize; and we had a very nice ceremony out at Monsignor Gilbert's home where they dedicated the French wartime boxcar. I was hoping to go out there this afternoon to see it again. Then I came up again to speak before the American Legion. George Christy, who I think is dead now—he was a radio commentator with one of the radio stations here, and he asked me to come up to speak before the Legion. I was up here two or three times. I've forgotten exactly. And I met a few people, and as far as New Hampshire is concerned—my brother had a place at Kittery Point. I used

to come up in the summertime to Portsmouth, and I go back to visit Exeter for class reunions. And thanks to Bridges and others I have kept—I won't say more than—I guess a little bit more of a contact up here than I have with some other states, though as a newspaperman I try to keep in touch with the politics in most of the states.

XQ. Mr. Pearson, in reference to being in touch with some Democrats here, at least in 1960—and Styles Bridges, obviously some Republicans—would there be any other Republicans here that you keep in touch with, or have in [90] the past, in New Hampshire? A. Well, Perkins Bass I knew, and Senator Cotton I know quite well. He and I were fraternity brothers. I see him from time to time. And I've forgotten who else.

XQ. Did you know the late Senator Tobey? A. Oh, yes. I knew him very well. I see his widow from time to time. She lives in Alexandria, Virginia. She had lunch with my wife the other day. She used to write me occasionally. Tobey, yes. I was very fond of Tobey.

XQ. Well, generally speaking, you try to keep abreast, then, of political developments in all of the states if you can; is that right? A. I do.

XQ. And you say you have particuar interest in—is it elections or spending, or is it both? A. Well, both. I have tried over the years to—not just in this Senator Dodd case, but over many years I have tried to expose violations of the Corrupt Practices Act; and its been my opinion that today, unfortunately, you can't run for office unless you're a millionaire, unless you have a lot of money or unless you get money through some underground channel or more or less illicitly; and this has been going on and building up over a period of years. That's [91] why I took the original interest in this 1960 race when I heard that Fulton Lewis had charged that Jack Kennedy was giving fifty thousand dollars to Professor Hill. I took my original

interest in this as a critic of Mr. Hill, because if that was true, I was going to write about it.

XQ. You mean if he had accepted— A. If he had received fifty thousand from Senator Kennedy, this to me would have been a black mark against his campaign; but I was convinced it wasn't true.

XQ. And so that's when you made certain phone calls, and there has been testimony about the amount of money the Hill campaign had? A. That's right.

XQ. There was some discussion about releasing this article, sir. I'll show you—I want you to look at the article you were describing. Does it have a release date on it? A. Yes. It has two dates. At the very end it says, "End Merry-Go-Round release". This means the end of this column. It doesn't mean the release. That's just describing the end of the Merry-Go-Round release for Saturday, September 10, 1960, but that isn't the release date. The release date is up here. This says, "Drew Pearson Merry-Go-Round release." That's the release date, September 10, [92] 1960, but it's the same date at the start of the column and at the end. There's another date at the end of the column that shows the date the column was sent. That's the 7th of September. That would be Wednesday. And as I told you a minute ago, this Saturday column always moves out on Wednesday.

Mr. Brown: From New York.

The Witness: From Washington and New York both, simultaneously.

Mr. Reynolds: Could we put in a Xerox copy of this? Mr. Pearson says it is the same copy.

* * *

[93] The Court: Defendant's "B".

[So marked]

XQ [By Mr. Reynolds] Mr. Pearson, just a few more questions, I hope. These notes marked Plaintiff's Exhibit

20, as I understand it, are the notes that you have that you made relative to writing the column; is that right? A. That's correct.

XQ. But what I want to get clear is, is there anything in the column not contained on those notes? In other words, do you just rely on these notes? A. No. No. I rely on conversations. Normally I rely—and I think in this case also—more on oral conversations than, possibly, notes; but when I am talking to someone over the telephone long distance, or even in Washington, I usually take notes of the highlights of the conversation. I don't take down everything. And I had also talked with Fernsworth, so that—and even regardless of these notes, I probably talked to Scott and the others on other things than those that are in my notes. Now, the Fernsworth notes on the New Hampshire political situation are very full, and I relied on them very heavily; and you will note that I practically quoted almost verbatim at times from his notes in the column, such as he says here, "The rock-ribbed [94] Republican State of New Hampshire", and where he tells about Nixon being sore at Powell because Powell didn't invite him to ride in the lead automobile in the parade. I've used all that. And he told about the division of the Democratic Party between Catholics, Irish Catholics and French Canadians, and so on. I've used Fernsworth entirely there, but I've relied on some oral conversations too.

XQ. Well, I ask, sir, do you have any reason to believe that the information contained in your column was not true? A. I have no reason to believe that. I think it was true.

XQ. By the way, have you ever met Mr. Roy? A. I never saw him until today that I can remember, though someone told me that he was at the Mercy Train cere-

mony here in Manchester. There were a lot of local dignitaries there, and I met a lot of people there.

XQ. Do you bear any personal ill will against Mr. Roy? A. None whatsoever.

XQ. Any personal ill will against Styles Bridges? A. No. Quite the contrary.

XQ. Or any of the other gentlemen mentioned in the article? A. No. I have no ill will at all. I was writing this as a newspaper reporter trying to report on an important political situation.

[95] XQ. What if any dealings before the publication of this article relating to this article did you have with Mr. Langley of the Concord Monitor? A. I had no dealings with him and had never met him until this morning. I have talked to him on the telephone when he was Ambassador, or I think shortly after he returned from Pakistan as Ambassador. I think I talked to him once. I'm not quite sure. I've had no dealings with him.

XQ. Prior to writing this column, other than your telephone call to Mr. Millimet, what dealings had you had with Mr. Millimet? A. None. I'd never heard of him until I had begun to look into this.

XQ. How about Professor Hill? What dealings have you had with him before writing this column, other than your testimony about telephoning him? A. None.

XQ. Have you ever met him? A. I did not—had not met him prior to this column. I may have met him since.

XQ. You never met Mr. Lavallee? A. No.

XQ. The only way you know him is through a telephone call to him in Grasmere? [96] A. That's the only conversation that I've had with him.

XQ. Would you say that you reported the information that you received accurately? A. I'm convinced that I did, that this column is accurate.

XQ. There was a reference to your notes saying—this

reference to small time bootlegging. Now, was there any —is there any other reference not contained in your notes but in your recollection as to any further details about this? A. Only that which I testified to in talking to Mr. Scott. I asked him for a few details as to how Roy was—about Roy's activities as a bootlegger, and he told me about the speakeasy in which he had seen him, and I think he used the word that he was "small-time" and the description of his activities seemed to me to fit into that category, that description. In other words, he wasn't a big rum runner. He wasn't a big liquor operator.

XQ. An Al Capone or something? A. No. Nor one of the big fellows who are now in the liquor business nationwide.

XQ. He never reported to you that he had been convicted of bootlegging and had a criminal record in that regard? A. No, he didn't. He did not.

[97] XQ. And you never so reported? A. I did not. He just said he was known, had that reputation. Having lived through the Prohibition era and having had my first drink on the day that—the night that Prohibition was about to go into effect, I didn't consider this any too great a problem around the United States.

XQ. One point I want to make that might help us, sir. Mr. Langley has talked about putting your column on the editorial page. He said there's news stories and then there's comments or editorial stories and then there are some syndicated columnists that seem to have both. I was wondering if you could tell me about how your own column fits in? Do you represent yourself as news or both or a commentator or what? A. Well, we in the newspaper business are inclined to divide ourselves up into two categories, the "think columns"—some of the critics of the think columns call them "thumb thuckers"—they "thuck a column out of their thum". And then there's

the other category which are reportorial columns, who try to report the news and dig it out. Now, I don't mean to cast any disrespect on the first category because I have great respect for men like Walter Lippman. He's a close friend of mine. But he writes a think column. [98] He doesn't go out as a reporter, but he talks to people. He is a man of great background and experience, and he will write a purely editorial column. He has been kind enough to pay tribute to me as the only investigative reporter left in Washington, but I do take some pride in trying to dig out the facts as a reporter.

Now, this column in question has very carefully listed the Congressmen who got free rides back home after Congress adjourned, and there's no if's and and's about it. It just reports this as a fact and it was a fact. This is not editorialization or a think column. Then it goes on to the column on New Hampshire which also is reporting on the situation, but it does have and I do frequently use some editorialization. For instance, the editorialization in this New Hampshire column would be the words "Rock-ribbed Republican", and I think it then was an accurate statement. Today New Hampshire is more Democratic, but at that time New Hampshire was considered strongly Republican. So there's some editorial in here, and I have from time to time combined to put in a certain amount of editorialization. For instance, on Pearl Harbor Day, which was Tuesday, the 25th anniversary of Pearl Harbar, this week, I wrote an entirely editorial column. I wrote it in the form of a [99] letter to my grandson on what was behind the last war, how we must prevent wars in the future, the changes that had come about since that time—Japan a friend of ours—things that we had to watch to prevent war. This was pure editorialization. So that I think it was—in describing my column it's accurate to say that it's a combination of both, through I think I lean a little more towards the reportorial column.

XQ. Well, this column on September 10 seems to have a title above "Rock-ribbed Republican". A. "Political Snafu"?

XQ. Yes. A. Yes. I don't think I wrote that title. I sometimes write the titles and sometimes I don't. Subheads. I imagine that was written either in the syndicate in New York or it could have been written by my staff after I left town.

XQ. The substance, though, of the New Hampshire article is that it was involving a political matter; is that the purpose of it? A. Yes.

XQ. One more gentleman I forgot to ask you about. What dealings have you ever had with Mr. Joe Scott, or relations with him, prior to the publication of this article other than these [100] phone calls or what has been testified to? A. None. I've never met Mr. Scott until this morning, and I have had no relations with him or dealings with him until—prior to these phone calls.

XQ. Did you in any way stand to gain anything if Herbert Hill had beaten Senator Bridges or the Democrats even swept the ticket in 1960 in New Hampshire? A. No. I would have lost a very good source in the Senate.

Mr. Reynolds: Thank you. I have no further questions.

Redirect Examination:

[By Mr. Brown]

Q. I have just a couple, sir.

As between editorializing and reporting facts, your assertions about Roy are in the column as recitation of facts; correct? A. Alphonse Roy, are you referring to?

Q. Yes. A. Well, this was reported as a fact, yes.

Q. So this isn't editorializing; this is supposed to be a reporting of objective facts? A. That's correct.

Q. Now, do you—I want to be sure I understand your

position, Mr. Pearson. Do you still say today that so far as you're concerned, what you said about Roy, what you implied about his position as being a stalking horse of Senator Bridges—is it your position still that so far as you're concerned, those are the truth?

Mr. Reynolds: I object, only because I lost the beginning of that question. It seemed to go on and on. Is there some shorter form?

Mr. Brown: Strike it out.

Q. [By Mr. Brown] Mr. Pearson, you've been in more than one libel suit; right? A. [Witness nodded]

Q. You know the three claims that are involved here? A. I think I do. Yes. They told me about them.

Q. You wouldn't—you don't deny that the column insinuates that Roy was procuring the other straws, the other candidates as straws? You don't deny that insinuation? A. No. I testified earlier I was convinced that was true.

Q. And you intended to convey that to the readers of the column? A. That's right.

Q. And you also intended to convey that Bridges had his fine hand in it, and you intended to insinuate that to the [102] reading public? A. I didn't think I only insinuated it. I thought it was pretty well brought out.

Q. You almost said it as a fact? A. I don't think there was any secret about that.

Q. I understand. And so far as whether or not Roy was a bootlegger, you made a bald statement that that was so? A. I made a factual statement.

Q. My question, sir, with regard to those three aspects of the column—today, is it your position, still, that all three were true?

* * *

A. May I—I'll attempt to answer the question if I may. I still believe this column is the truth.

* * *

Q. Now, the only other thing that I have is this: You've already told us that this type of column—commenting on [103] a situation in an election—you planned to get released before the election took place and reasonably near to the date of election. Did you have in mind that publishing the column would affect the results? A. No, I didn't. If I—I think that if I had, we would have published it a little earlier, because last minute columns don't affect an election.

Q. Well, what would you expect intelligent readers of that to gain as an impression of Roy as opposed to Hill, if they had read that column and were undecided? Do you think they'd go to vote for Roy or for Hill? A. That was not my intention. That was not my purpose in publishing the column. Let me say that the voters of the United States have a right to know the background of every candidate.

Q. Surely. The truthful background? A. That's correct.

Q. Yes.

Mr. Brown: That's all. Thank you, very much, sir.

Recross Examination:

[Mr. Reynolds]

XQ. Mr. Pearson, you say this column—Brother Brown did—insinuates certain activities on the part of Styles Bridges is that right? [104] A. That what he said.

XQ. And you believe that to be so? A. I do.

Q. And after you wrote this column, sir, did Styles Bridges ever complain to you about it or sue you for libel about it? A. No, he never did. We continued to have very friendly relations.

Q. Do you have reason to believe that he had seen this column? A. Oh, I'm sure he had.

* * *

[189] *Testimony of William C. Ryan*

* * *

Direct Examination:

[By Mr. Brown]

* * *

Q. What is your name, sir? A. William C. Ryan.

Q. And what is your line of work? A. I'm a shoe worker, shoe cutter, by trade.

Q. And have been for how long? A. Oh, for many many years. About thirty-five years.

Q. Mr. Ryan, are you a family man? A. Yes, I am.

Q. Have children? A. I have two sons.

Q. In your trade as a shoe cutter, have you had any union responsibilities over the years? [190] A. Yes, I have.

Q. What were they? A. Well, I've been steward of the union for about five years. I've been executive board member for about two years. And I was a business agent for about the same length of time, about two years.

Q. Have you at any time been a candidate for public office? A. Yes, I have.

Q. And when you have been a candidate, Mr. Ryan, in which party did you run? A. Democrat Party.

Q. Democrat. What was the situation in 1960? Were you a candidate for any office in that election? A. Yes, I was. I was a candidate for the Council seat.

Q. Governor's Council? A. Third District.

Q. By the way, whereabouts in Manchester did you live at that time? A. I lived in the same address.

Q. What ward? A. Ward 7.

Q. Mr. Ryan, we're trying a case here on a complaint brought by Alphonse Roy concerning an article that was published [191] in several newspapers, including the Con-

Cord Monitor, on the 10th of September, 1960. I want to ask you first, sir, did you, in 1960, have occasion to read Drew Pearson's article that referred to Alphonse Roy? A. Yes, I did.

Q. And when did you read it with respect to the election, before or after? A. Before.

Q. How did it happen that you read the article before the election? What were the circumstances? A. Well, I met Mr. Sullivan. He had his Concord Monitor and he asked me if I saw the article. I said no. He let me read it.

Q. Which Mr. Sullivan are you talking about? A. Henry Sullivan, the attorney.

Q. And you read the article when? What date was it? A. The 12th.

Q. The day before the election? A. The day before the election.

Q. What were you doing on election day, on the 13th? A. On the 13th I was touring the wards.

Q. Why. A. All the wards in the city, and I went to Derry and Hooksett.

[192] Q. Why do you politicians tour the wars on election day? A. Well, to greet the voters and see how things are going.

Q. Let me ask you, Mr. Ryan, as you were going around the wards here in Manchester, did you hear any discussion of Roy? A. I did.

Q. What did you hear being discussed about Roy at the polls that day?

[193] A. Well, in several of the wards—in fact, one specific case in Ward 13 when I was touring the wards there were two women who were evidently, I don't know, they might have been Hill supporters. They had hats and they had buttons, and one of them said to this woman that was going in, she said, "Do you know Alphonse Roy was a bootlegger," she said, "because we read it in the

paper?" Now, I don't know the women or—I happened to be standing there greeting voters. I was trying to get votes for myself, and I overheard this conversation.

Q. What about other wards as you were going around that day? A. Well, I heard it in Ward 8 and I heard it in Ward 14, and I heard it in my own Ward, 7.

Q. Did you hear it just on a single occasion in each ward, or [194] was it generally being discussed or what? A. No. In different ways they'd put it. Now, up in Ward 8 they said "Alphonse Roy—are you going to vote for that bootlegger?"

Q. They were talking him down on tha basis? A. Yes. They were talking that way.

Q. Mr. Ryan, in the election of 1963, at the election of Mayor, do you recall Mr. Roy was a candidate in that election. A. I do.

Q. Were you active in that election? A. I was active for the Republican candidate, John Mongan but going around I heard from one end of the city to the other, "Don't vote for that bootlegger. Roy is a bootlegger." That's all I heard.

Q. The report was more prevalent in that campaign than in 1960? A. Oh, yes. Far more.

* * *

[195] Q. [By Mr. Brown] Mr. Ryan, how long have you known Alphonse Roy? A. Well, I will say about thirty years.

Q. Do you remember the occasion in 1936 when Mr. Roy and A. B. Jenks ran a tight race for Congress that ended up in two recounts? A. I do.

* * *

Q. . . . Mr. Ryan, in the 1936 primary campaign, were you supporting Roy or somebody else? A. No.

* * *

[196] A. I was supporting a neighborhood friend of

mine, Jack Sheehan, attorney Sheehan today, because I had not known Mr. Roy at that time but I supported him because he was a neighborhod friend and I knew him all my life.

Q. And were you actively working for Jack Sheehan in that campaign? A. I was.

Q. After Roy beat Sheehan, were you active in the general election? A. Yes, I was. I supported the whole ticket.

Q. What about two years later, in '38, when Roy ran against Jenks again? Were you active in that campaign?

A. Not so much.

Q. But you were in the '36 campaign? A. I was in '36.

Q. Tell the Court and jury, Mr. Ryan, what the situation was in '36 with respect to whether there was any gossip that Alphonse Roy was bootlegging? A. I never heard a word in the whole '36 campaign.

[197] Q. During part of your lifetime here have you lived on the west side? A. Yes. I was down there for seven years.

Q. What did you hear as a resident of the west side so far as Roy was concerned and bootlegging? A. I never heard Mr. Roy was anything but a perfect gentleman.

Q. Mr. Ryan, in addition to your having run for the Governor's Council in 1960, have you also been a candidate in the Democrat primary for other major offices? A. Yes, I have.

Q. And when was that? A. 1958.

Q. And what office did you stand for then? A. I run for Congress that year.

Q. In '58? A. Yes.

Q. Against Roy? A. Against Mr. Roy, yes.

Q. And he licked you? A. Yes.

Q. Then he got licked? A. What's that?

Q. And then he got licked? [198] A. Yes, and then he got defeated.

Q. In both of these years, '58 and '60, Mr. Ryan, were you also a candidate for delegate to the state convention of your party? A. I was. I was elected twice.

Q. And have you been active as a person actively working in campaigns in more campaigns than these two? A. Oh, yes. Many campaigns.

* * *

[202] Q. ... Well, Mr. Ryan, let me ask you a couple of other questions. As you read this article with respect to Mr. Roy, what was your understanding as to what the column was saying about Mr. Roy? What did you understand it to mean about Mr. Roy? A. Well, I thought it was a very defamatory piece of literature.

* * *

Q. ... What I'm getting at, what did you understand Pearson to be saying about Mr. Roy? What did you understand the article to mean when it said — A. To me, after I read the article as to what it said, I was astounded myself that it would ever be printed.

Q. Mr. Ryan, you don't quite understand what I'm asking you, [203] and it's my fault not yours. The language, the first actual mention of Mr. Roy is where the publisher says, the writer says, talking about Frank Sullivan, "To make sure he would get out in time to run for the Senate, a former small-time bootlegger and later U. S. Marshal, Alphonse Roy, telephoned the Grasmere warden about Sullivan."

Now, what did you understand the article meant when it referred to Roy as a "former small-time bootlegger"? A. What did I understand it to mean?

* * *

Q. ... Mr. Ryan, what did you understand the reference was in calling him a bootlegger? What did you understand

that to mean? What was the article saying that Mr. Roy had done? A. The article was saying that he had been a bootlegger.

Q. What did you understand a bootlegger to be? A. A bootlegger, a man who sold liquor illegally.

* * *

[205] Q. ... I take it, then, Mr. Ryan, that the portion of the article that commanded your attention was the reference to the bootlegging? A. That's right.

* * *

Cross Examination ...

XQ. Mr. Ryan, I have a few questions. When were you asked to come here to testify? A. When was I asked?

XQ. Yes. A. Oh, maybe a couple of weeks ago, three weeks ago.

XQ. Mr. Roy asked you? A. Not Mr. Roy.

XQ. Oh. You have spoken with Mr. Roy? [206] A. Yes, I have.

XQ. And he's a good old friend of yous? A. Well, he ain't an old friend. I wouldn't say old friend. I know the fellow very well.

XQ. Oh, I thought you said you'd known him for thirty years. A. I have known him for thirty years. I have known Mr. Roy as a gentleman for the last thirty years, but I only supported him once.

XQ. You only supported him once? A. That's right.

XQ. In political campaigns? A. In political campaigns.

XQ. But you consider yourself a friend of his? A. Yes. We're all Democrats. We're all supposed to be friends.

* * *

[207] XQ. And Mr. Sullivan is Frank L. Sullivan? A. I don't know him. I never met him in my life.

XQ. I see. In that particular race, then, there was Mr.

Roy, Mr. Cullen, Mr. Sullivan, Mr. Ryan? A. That's right.

XQ. Now, if I represented to you that the Red Book shows that you got 1702 votes in that election, would you that would probably be correct? A. Yes. That's correct.

XQ. And that Frank Sullivan got 6,089 votes? A. That's right.

XQ. Matthew Cullen got 6167 votes? A. That's right.

XQ. And Alphonse Roy 9,440 votes? A. If it says it in the Red Book, that's it. Do you want me to explain? I'll explain.

XQ. Well, let me ask you a few questions. If you want to explain, you go right ahead. One of the things I was wondering about, as Mr. Brown says, you're familiar with political life here, I guess? A. I am very familiar with it.

XQ. Now, the name "Ryan" would be an Irish name? A. It is. It is.

* * *

[209] XQ. Well, it is your opinion, then, that this situation where you put in three people of Irish extraction with one person of French extraction, the Irish will tend to split the vote? [210] A. I wouldn't know about that, Mr. Reynolds, but I might say this, that I had intended to run — I told the city chairman here I was going to run in May of that year, and I didn't see anybody filing only Mr. Roy and Mr. Cullen, and I thought Mr. Cullen, not being known, I thought I would have had a good opportunity of knocking that nomination over; and I was very competent, too. I could have very well represented this district.

XQ. In other words, you only got 1700 votes? A. I realize that. I'll tell you why I got the 1700 votes, because there was a smear, innuendo and everything else against me. I was even smeared all over the place, called a drunk, and I never took a drink in my life.

XQ. You mean during campaigns the language gets

pretty— A. It gets pretty rough, and if you don't believe it, you just run for office and see how rough it's going to be.

XQ. I don't think I'll do it for awhile. A. They smeared my character, defamed it practically. I had a family to think of. But they didn't put it — they were cute enough — these gossipers were cute enough never to put it in the paper, never to put it in print, for it they had I would be in here too. I would have brought suit against them.

* * *

[212] XQ. But in this sort of situation, would this be similar to your 1958 one? In other words, the filing of these men would draw votes more from Hill than from Roy? A. No. I think by Sullivan filing in the race he hurt Roy because they both come from the same city, and a lot of people here knew the character he was and they might have voted for Roy. That's my estimation of the whole thing.

* * *

[213] TESTIMONY OF RALPH J. LAVALLEE

* * *

Direct Examination: . . .

Q. Would you state your name and address, please? A. Ralph J. Lavallee, 3 McWiggin Road, Goffstown, New Hampshire.

Q. What is your present occupation, sir? A. Postmaster.

* * *

Q. Now, there's been some evidence in the case about a telephone call that you received from Mr. Roy. Do you remember that you did receive telephone calls from Mr. Roy in 1960? A. I did.

Q. At Grasmere?

* * *

[214] Q. Now, when Mr. Roy called, what was it he said

to you? A. Well, he called me, he wanted to know if I could provide some support for his upcoming campaign, and in the course of the conversation he asked me if Mr. Sullivan was serving time at that particular time, and that was answered in the affirmative.

Q. Mr. Sullivan — A. Was serving time in the House of Correction at that particular time. And then he asked me what date he was to be released, and that information was given.

* * *

Q. Do you know — do you remember whether or not you had any conversation with Mr. Roy about whether Mr. Sullivan would [215] be released in time to file in any of the political races? A. No. That was not mentioned by Mr. Roy nor myself.

Q. Not mentioned by either one of you? A. No, sir.

* * *

[216] Q. And did you subsequently receive a telephone call from Mr. Pearson, Drew Pearson? A. Yes, I did.

* * *

Q. Can you remember what Mr. Pearson said to you when he called? A. Yes. To a degree I do. Mr. Pearson asked me who I was and he told me who he was, and he asked me if I had received a call from a Mr. Alphonse Roy what was calling for his friend Styles, and that I denied; and then he asked me if I denied that I had received a call from Mr. Roy, and I told him that I was not denying that part of it, I had received a call from Mr. Roy but Mr. Roy had never mentioned the name "Styles".

Q. To whom did you understand him to be referring when he used [217] the name "Styles"? A. The late Senator Styles Bridges.

Q. I guess I didn't ask you before. During your conversation with Mr. Roy, was there any discussion of Styles Bridges on either your part or his? A. No, sir.

Q. None at all? A. None whatsoever.

Q. All right. What else did Mr. Pearson ask you, if you remember? A. Well, he asked me the question again, if I was positive that the name "Styles" — or if Mr. Roy had called me for his friend Styles, and that I told him was not the case, he had not mentioned the name of Mr. Bridges or "Styles" as he called it then. That was the extent of the conversation. He wanted to know if I was sure of it, and I was.

* * *

[218] Q. ... You know Mr. Roy prior to this time, I [219] take it? A. Oh, yes. I did.

Q. Was it unusual for him to ask you for support in a political campaign? A. I'd say not, no.

* * *

[1] Tuesday, December 13/66

TESTIMONY OF ROMEO A. HARBOUR

* * *

Direct Examination

[By Mr. Brown]

* * *

Q. And from 1926 on for a period of years, what did you do for a living? A. Police duty.

Q. How long were you on the force? [3] A. Twenty-eight years and some months.

Q. During a portion of your tour of duty with the Manchester Police Department were you on the so-called liquor squad from time to time? A. I was.

Q. I'd like to ask you, Mr. Harbour, during the time that you were engaged in this activity, did you ever have any complaints about Alphonse Roy? A. No.

* * *

Q. I asked you to come down here the other day when Mr. Scott was testifying about — he said that he and a fellow by the name of Frankie Moran went into a joint on Marion Street, on the second floor. I think he said it was in the same area where a Chinese laundry was on the first floor. And that Shorty Glaude sold whiskey to them, to Frankie and to Scott, during Prohibition while it was illegal. Was there a joint up there where he's talking about?

[4] A. That's right. There was.

Q. I had him mark, Mr. Harbour, on this plan where he had in mind the place was, and it's about opposite where the alley comes into Marion Street. I think the numbers that he covered are 21, 19 and 17. Is that where the joint was, in that area? A. That —

Mr. REYNOLDS: Excuse me, Brother Brown. What joint now?

Mr. BROWN: The joint where Joe Scott says that he and Frankie Moran went to the second floor and Frankie bought a pint and he and Scott bought a shot apiece and drank it — from Shorty Glaude.

Mr. REYNOLDS: Well, I was confused as to how this witness knows which joint Mr. Scott was talking about.

Mr. BROWN: Do I have a question pending, Mr. Sheehan?

[Question read]

Q. [By Mr. Brown] Is that where it was? A. That's right.

Q. You know that a joint did exist there? [5] A. Yes, sir.

Q. Do you know who was operating it? A. Oscar Lasalle.

Q. Who did he have working in there with him? A. He had George Glaude.

Q. That's "Shorty" Glaude, they called him?

A. I don't know whether they called him "Shorty". I always called him George Glaude.

Q. Anyone else? A. Russell Beaulieau.

Q. Anyone else? A. Tony Roy.

Q. To your knowledge, so far as you know, did Alphonse Roy have any connection with that joint? A. No.

Mr. BROWN: You may inquire.

Cross Examination . .

XQ. Mr. Harbour, you retired from the police force in 1950 — in the 1950's sometime? A. 1954.

XQ. You went on the force in 1926, sir? A. That's right.

XQ. Now, there was a liquor squad — you were here when [6] Mr. Buosso talked about the squad? A. Yes.

XQ. And that consisted of three or four or five men from time to time during Prohibition? A. That's right.

XQ. And it was this squad whose duties were to try to keep track of — enforce Prohibition laws? A. Right.

XQ. Now, when did you go on the liquor squad, sir? A. I went on the squad September the 24th, 1931.

* * *

[9] XQ. In 1932, when you went on the force, through 1933, in that period, had you ever heard of Alphonse Roy at all in any connection? A. Heard rumors.

XQ. What did you hear? A. You hear people say he was bootlegging, but I never knew he was. Never got a complaint about him.

XQ. But you heard those rumors back in the early '30's? A. Yes.

XQ. When he was running for office? A. Yes.

XQ. And the rumors were to the effect he had been a bootlegger, or he was one? A. I don't recall what the rumors were.

XQ. But they were about Alphonse Roy and bootlegging? A. Yes.

XQ. And his name was connected with them? A. Yes.

XQ. And it's the same Alphonse Roy that's here in court? A. Yes.

Mr. REYNOLDS: Thank you, Mr. Harbour.

Redirect Examination

[By Mr. Brown]

Q. Mr. Harbour, so far as you are aware, as an officer on the [10] force during that period, there was no evidence and no complaints about Alphonse Roy with respect to bootlegging? A. That's right.

[11] TESTIMONY OF STANLEY THIRSK

* * *

Direct Examination...

* * *

Q. Now, directing your attention to the period of Prohibition, the '20's and early '30's, did you live in Manchester? A. Yes, I did.

Q. During that time, or any part of that time, did your work involve the enforcement of the Prohibition laws? A. I went to work for the Department of Justice, Bureau of Prohibition, in November of 1929.

Q. And how long did you continue in that work?

A. I worked in the enforcement until August, 1935.

Q. Were you with the Justice Department throughout that period? A. I was with Justice, I was with the New Hampshire State Law Enforcement Department, and I was also with the Alcohol Tax Unit of the Treasury Department.

[12] Q. In what capacity did you serve? What was your job? A. Well, I would say the work was to investigate and accumulate evidence and information.

Q. In what geographical area did you pursue this work?

A. Well, the entire state of New Hampshire. Sometimes we went over into Maine, sometimes into Vermont, sometimes into Massachusetts.

Q. Now, in the course of this work as an investigator, what evidence or information did you receive indicating that Alphonse Roy was a bootlegger? A. I never heard anything of that nature.

Q. Did you have any evidence of that indicating that he was a bootlegger? A. No, I did not.

Q. Did you have a list or have people in mind who were suspects in connection with the bootlegging business? A. We carried a list of suspected transporters and the registration numbers, and we carried also a list of known violators.

Q. And did Mr. Roy appear on any of these lists?
A. No, he did not.

Q. Prior to 1929 and your working as an investigator, were you employed in Manchester? [13] A. Yes, I was

Q. In what capacity? A. I was in the automobile business.

Q. As far as you know, during that period of time did you have any information which indicated that Mr. Roy was in the bootlegging business? A. No. I had no information.

* * *

Cross Examination

[By Mr. Reynolds]

* * *

[19] XQ. Well, I mean you knew, for example, in the late '20's and '30's that Mr. Roy was running for various offices, or had started to run for alderman? A. Yes. I was aware of that, yes.

XQ. And that he had run for Governor's Council in, I think, 1931 or '2? A. Yes.

XQ. Did you ever hear any stories about Mr. Roy during those campaigns? A. I didn't pay much attention to them.

XQ. Well, did you hear any stories about him? A. No, I did not.

XQ. You never heard any stores during that period that Mr. Roy — rumors that he had been in the bootlegging business? A. I never heard any rumors, no.

* * *

[21] TESTIMONY OF FRANK L. SULLIVAN

* * *

Direct Examination: . . .

* * *

Q. Where do you live, Mr. Sullivan? A. 107 Douglas Street.

Q. And for how long have you lived there? A. Since 1910.

Q. You own your own home there, do you? A. Yes, sir.

Q. And in addition to its being your own home, Mr. Sullivan, do you also have rental units there? A. Yes, sir.

Q. Are you married? A. Yes, sir.

Q. And have a family, do you? A. Yes. Two boys and two girls.

Q. And without getting into it in great detail, what do the children do? What do the girls do? A. Two of them are school teachers. The other one is in service — twenty years old — since last February. I [22] expect he's going to Vietnam. And the other one is going to be an attorney this summer.

Q. And you and the wife brought the family up living at that location? A. Yes, sir.

Q. Now, Mr. Sullivan, you became a politician at some point in your career, did you? A. Yes.

Q. Before you started running in politics, were you working out, working on jobs for other people?
A. In politics?

Q. No. Before you went into politics, how did you make your living? A. I was a steel worker down to Lyon's Iron Works for about seven or eight years, here in Manchester.

Q. And in addition to working down there at Lyon's, did you have some position with the union? A. Yes. I was the treasurer of the local union.

Q. And for how long a period? A. For about six or seven years.

Q. Now, do you recall, Mr. Sullivan, when it was that you first ran for major public office? A. In 1947.

• • •

[33] Q. When the 1960 year came around, Mr. Sullivan, you decided to run again? A. Yes.

Q. And in this year you ran for what? You filed for what?
A. United States Senate.

Q. And do you recall as the campaign finally was conducted, Herbert Hill of Hanover, Mr. Roy and yourself were the three candidates on the ballot? A. Yes.

Q. And in that election Hill won, you recall? A. Yes.

Q. And according to the Red Book, Mr. Hill got 16,198 votes? A. That's right.

Q. Alphonse Roy came in second with 13,782?
A. That's right.

Q. And Frank Sullivan picked up 10,266? A. That's right.

Q. Is that the way it came out? A. Yes.

Q. Now, Mr. Sullivan, you recall that shortly after you filed [34] for the Senate in 1960 petitions were brought before the Ballot Law Commission attempting to remove

your name from the ballot as a straw candidate? A. Yes.

Q. You testified at the Ballot Law Commission hearings yourself? A. Yes.

* * *

Q. ... What is there, Mr. Sullivan, about your testimony that you gave at the Ballot Law Commission that needs to be changed? Is there anything? A. Nothing, I believe.

* * *

Q. Tell us, Mr. Sullivan, tell us whether or not anybody [35] solicited you to go into that campaign. Did anybody ask you to go into that campaign as a favor to them? A. No.

Q. How did you happen to go into it? A. For the last ten years before that I been bit by the political bug, and I just went in it because I thought I'd have a chance.

Q. What did you expect to gain by going into it? What did you expect the result to be? Did you expect to win or lose? A. Win.

Q. Tell us what conversations, if any, you had with Alphonse Roy with regard to your filing. A. None whatsoever.

Q. Had you even talked to him about it? A. I don't remember talking to him, but I could because we live in the same neighborhood.

Q. But you don't recall even talking to him about it at all? A. No.

Mr. REYNOLDS: Well, I'm going to object. The witness already said he could have.

Q. Well, Mr. Reynolds said that you just said you could have talked to Mr. Roy about filing. A. Not about filing, no. Not about filing. But we live in [36] the same neighborhood. I could have saw him. But not about filing.

Q. Did Mr. Roy have anything at all to do with your entering that contest? A. Pardon?

Q. Did Mr. Roy have anything at all to do with your entering that primary contest? A. No, sir.

Q. Did any friends of his have anything to do with your filing? A. No, sir.

Q. Oh, yes. Just one other thing, Mr. Sullivan. Do you know Joe Scott? A. Yes, sir.

Q. He has testified here about — before this jury — to the effect that he met you on Elm Street shortly after you filed, that Joe Scott told you you should be ashamed of yourself for having done it, and that you took a roll of bills out of your pocket, a big roll of bills, lost a few of them on the street, and that Joe helped you pick them up, and that you told Joe that Alphonse Roy had paid you that money for filing. Now, I want to know from you, Mr. Sullivan, is that true or false? A. That's false.

[37] Q. Did Alphonse ever give you any money in connection with filing? A. He never did.

Q. Did you ever tell Scott that he did? A. I never did.

Q. Did anybody pay you for filing? A. Nobody ever did.

Mr. BROWN: You may inquire.

Cross Examination

[By Mr. Reynolds]

* * *

[46] XQ. Mr. Sullivan, I don't like to have to go into some things here, but I'm afraid we might have to. In 1960, sir, you were in the House of Correction; isn't that correct? A. If you want to put it that way, put it out blunt and blank. I don't like to say nothing about it. I've got all my kids coming home for Christmas, but I have been arrested for being drunk, yes, and that's the only charge ever against me in my life, and that's the whole thing, and I do not like that in the newspapers because my kids are all coming home for Christmas and are going to read it. I'd like to keep [47] that

part out of it. I'll admit I was arrested for being drunk. No big long story about it.

XQ. I won't go into a big long story. A. Thank you.

XQ. This was in the newspaper when you were up at the Ballot Law Commission, wasn't it? A. What?

XQ. This was all reported in the newspapers? A. Yes.

XQ. Back in 1960? A. And the Ballot Law Commission cleared me, and if you want to hash it over again, go ahead. They cleared me.

XQ. And you were allowed to run? A. Yes. They cleared me.

XQ. And they said you were not a straw; is that right? A. That's right.

XQ. And at that Ballot Law Commission hearing you testified, didn't you? You were asked questions by Mr. Wyman, weren't you, at the Ballot Law Commission hearing? A. Yes.

Q. And these questions had to do, sir, with how you got the hundred-dollar filing fee, didn't they? A. I answered that question.

[48] XQ. Right. Now, wasn't the question asked you, for example: "When did you get out of Grasmere?" and I think you said "July 7". Would that be — ? A. That would be about right if I said so.

Mr. BROWN: I think it was July 6.

Mr. REYNOLDS: Well, whatever the transcript shows.

XQ. The 6th or 7th? A. Yes. That's right.

XQ. And were you aware that the last day for filing was July 28? A. Aware? I knew I was going to file before I got arrested. I didn't even expect to get arrested.

XQ. I'm sure of that. Well, the last day of filing was July 28 and you filed at 2:00 in the afternoon; is that right? A. I believe so.

XQ. You filed on the very last day? A. I think I did, yes.

XQ. And didn't they ask you at the Commission how did you get up to Concord to file? You went up by yourself? A. I went up on the bus. It run every hour on the hour.

XQ. And you brought with you on the bus one hundred dollars? A. That's right. Yes.

XQ. And these were in small bills or something? A. It was my rent money. I have three tenements. I have a [49] four-tenement house and I rent three, and it was my rent money. I was saving it up for several months.

XQ. Well now, this is what I was going to ask you about. A. Well, that's what I'm telling you.

XQ. Okay. And you had been saving this money where, Mr. Sullivan? A. In my pocket.

XQ. So while you were in jail for — were you in ninety days or something like that? A. I had three mitts. Three times I was arrested and the Judge didn't do anything, just gave me the mitts, and all of a sudden the mitts boiled up, you see what I mean, and I had to pay my debt. I don't see why you have to bring that all up and hash it all over, because it's going to be a reflection on my kids. My kids are going to read it in the paper and say "Daddy was arrested", and I've got two daughters and a son going to Vietnam, and I think you ought to let me alone.

XQ. I would like to, but Mr. Brown put you on the stand and I have to ask you these questions. I objected to this whole thing.

Mr. BROWN: I'm sorry. I asked nothing about this.

The COURT: I'll sustain your objection.

[50] XQ. [By Mr. Reynolds] Mr. Sullivan, what I'm getting at is this filing money. A hundred dollars is a lot of money, isn't it? A. Yes.

XQ. Did you keep this hundred dollars in your pocket, sir, during the period that you were out there in Grasmere? A. No. I kept it in my — what I call my Sunday suit pocket.

XQ. Well, I mean it was at home? A. Yes. At home. My Sunday suit pocket.

XQ. Do you usually keep a hundred dollars in your suit pocket? A. Not unless I have a purpose.

XQ. Well, the purpose was to use it to file for the Senate? A. Yes.

XQ. And how long before had you decided to file for the Senate, sir? A. About three months.

XQ. And then did you start saving this money then? A. That's right.

XQ. Well, what I'm getting at is, you were in jail for eighty days or so, isn't that so? A. I told you I had three mitts.

XQ. Well, what I'm wondering is, how did you save money while you were in jail? You weren't being paid while you were there, were you? [51] A. I had the rent coming.

XQ. I see. So while you were in there — does your wife collect the rent? A. Sometimes she does, sometimes she doesn't.

XQ. If you were unavailable, who would collect the rent? A. My wife. Sometimes they even give it to my children.

XQ. Your wife and children collected the rent money? A. Not always. Sometimes.

XQ. No. I mean in this three-months period before you filed, while you were in Grasmere. A. Yes.

XQ. Did they collect it? A. Well, yes.

XQ. And then they put it aside for you and saved it? A. No. I had been saving this for a whole year, that hundred dollars out, for a whole year.

XQ. You had had a hundred dollars for a whole year? A. It took me a whole year to save it.

XQ. Okay. And this was in small bills? A. Yes. Yes. Small bills. Five-dollar bills, ten-dollar bills. Even some ones.

XQ. So by the time the mitt was issued, Mr. Sullivan,

and you had to go over, you had already saved the hundred dollars? [52] A. Yes.

XQ. And you put it in your Sunday suit? A. In my Sunday suit.

XQ. And left it at home in the closet? A. Yes.

XQ. And the hundred dollars was — it was your plan to use this money to file for the United States Senate? A. I wasn't sure at that time whether I was going to file for the United States Senate or not. I was just saving because I was going to file for something.

XQ. I was going to ask you that. A. Well, that's it.

XQ. Why was it the United States Senate, say, as opposed to Congress? A. Well, I don't know, I didn't know, but I knew I was going to file.

XQ. Well, what other offices were you thinking of? A. Congress. Because that was fifty dollars and that's what I was thinking of.

XQ. It would be cheaper to file for Congress? A. Yes. Yes. That's right. That's what I was thinking of.

XQ. Well, what changed your mind and made you decide to file for the Senate? [53] A. Well, I know Herb Hill personally. Him and I were delegates to the national convention in Philadelphia for the nomination of the President of the United States, and at one time I was vice chairman of the State Democratic Party in New Hampshire, and Herb Hill was the chairman. So I knew him personally, and our two natures did not click. We didn't seem to click together, you know. So that's about it. That's the reason that I filed for — because our two natures didn't click. And naturally I can understand that, with his category and mine. He's a professor and me, I'm just plain, ordinary, average nothing.

XQ. Well, when did you form this idea to file for the Senate as opposed to Congress, Mr. Sullivan? A. When?

XQ. When did you form the idea to file for the Senate? A. When Herb Hill filed.

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[61] *Redirect Examination . . .*

* * *

Q. . . . Mr. Sullivan, all I wanted to ask is, how many more votes do you figure you would have gotten if this had been a two-man race between you and Alphonse Roy? How many more votes do you think you would have picked up out of these other two fellows, Ryan and Cullen? A. I have to answer that honestly in this way: I was secretary-treasurer of the American Federation with 40,000 [62] members in the State of New Hampshire, and out of that 40,000 at least half of them were French, and they'd vote for Sullivan before they'd vote for Roy, because if they were in the union, as secretary-treasurer, they were union members, and union members like union members. They don't care about nationality.

* * *

[63] Q. Have you found, Mr. Sullivan, that the fact that you're from Manchester tends to result in Manchester people supporting you? A. Yes, I do.

* * *

[67] TESTIMONY OF ANTONIO ROY

* * *

Direct Examination . . .

Q. What is your name? A. Antonio Roy.

Q. And, Mr. Roy, how old are you? A. Sixty-two.

Q. Do you work or are you retired? A. Retired.

Q. Are you related in any way to Alphonse Roy?

A. Notsoever.

Q. We had some testimony here the other day that a

fellow by [68] the name of Joe Scott and a fellow by the name of Frankie Moran came into a liquor joint on Marion Street and were served liquor and bought some liquor from someone by the name of Shorty Glaude. Was there such a liquor establishment? A. Yes. George Glaude, you mean.

Q. Was there such a place on Marion Street? A. There was, yes.

Q. Who operated it? A. A fellow by the name of Mitchell Beaulieau, Wilfred Terrien and George Glaude.

Q. How do you know? A. Well, I was there most of the time.

Q. When the other fellows were out — A. I'd take over.

Q. You took over. Was there any other Roy aside from yourself connected with that operation? A. No.

Q. And were you giving these other fellows a hand in this operation all the time that they were located on Marion Street? A. Yes.

Q. Do you recollect what the address on Marion Street was?[69] A. Gee, I don't. It's thirty-four years ago.

Q. Well, Mr. Scott put an "X" on the map, and I think his "X" covers from Number 21 through 19, 17. Was that the area, or can you tell from that? A. That was it right here.

Q. Right at the — A. Is that "16"?

Q. That says "15", I think. A. It was just about right here.

Q. He indicated — Mr. Scott indicated — A. Let me see that again, please. No, that's —

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Q. What number do you actually think it was? A. 17.

Q. Number 17. Was there a Chinese laundry in the same building? A. Yes. In the corner, downstairs.

Q. And what floor was this place on? A. Second floor.

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[77] *Redirect Examination . . .*

Q. Just a moment, Antonio. Did you by any chance know Frankie Moran? A. Yes. I know Frankie a long time.

Q. What about Joe Scott? Do you know him? A. I wouldn't know who he is.

Q. But was Moran in the joint? Did you sell to Moran? A. No. We didn't want to sell to him. He was there quite a few times, but we didn't encourage him because he had a bad, you know — he was bad when he was drunk. We didn't want to give him liquor. We didn't serve him when he comes in there, you know.

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[78] TESTIMONY OF ARTHUR BLANCHETTE

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Direct Examination . . .

* * *

Q. And did you ever live in what they might call the Flatiron District? A. Yes.

Q. Where? A. On Marion Street.

Q. Do you remember about when that was? A. 1931. 29 Marion Street.

Q. Did you ever take a drink in those days? A. Oh, yes.

Q. Were there any speakeasies around there? A. Yes.

Q. You just heard Mr. Roy testify? A. Yes.

Q. Did you recognize the place he was talking about? A. Yes.

[79] Q. Would you tell us what your recollection is as to where that place was? I show you this plan marked Plaintiff's Number 15.

* * *

Q. Could you point out on the sketch where the speakeasy was? A. It was right here, about. Right in the middle here. Marion Street, on this side. That's where I used to live. On the other side was the speakeasy place. Next to my house on Marion Street.

Q. You lived at Number 29? A. I lived 29, on the other side of the speakeasy, second floor.

Q. And what was downstairs? A. Downstairs was a laundry that the Chinaman had.

Q. And was this place — which street was it? A. Between McGregor and Main Streets.

Q. And on which side from where you lived? A. On my right, right hand side. I used to live on the right, [80] and then the speakeasy place was next to me on the left.

Q. Do you know who was working there? A. Yes. There was three. There were three that I know.

Q. Well, who are they that you know? A. One was Russell Beaulieau and George Glaude and Tony Roy, Antonio. They called him "Tony".

Q. Is that the man you just saw? A. That's right.

Q. Do you know whether or not Alphonse Roy ever had anything to do with it? A. I know Alphonse Roy for many years, and I never see him in a speakeasy place either. I don't think he's involved either. I never saw him. I know him for many years.

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[83] TESTIMONY OF WILLIAM GAY

Direct Examination . . .

* * *

Q. I'd like to ask you to tell the Court and jury, if you would, when you first heard or saw Alphonse Roy, what the circumstances were. A. My first recollection of Mr.

Roy, we had just previously moved to Manchester from Derry, and we knew no one in town here, but some of the boys and myself were walking around [84] the high school one evening, and I remember a rally was being held, a political rally, and we decided it might be fun to go inside and probably acquire a little political science, and I walked in, and I remember that Mr. Roy was on the program that night; and the reason perhaps that I remember so far back is that I was quite impressed at the time with his speaking ability. I liked his voice and his delivery, and I remembered him through the years. I used to see his picture in the paper and read about him, his activities; but it wasn't until the '50's, '55 or '6, that I actually met Mr. Roy. And that happened, that happened — I had just started real estate, and I was going down Amory Street, and I recall one day that he was standing in front of his office, 131, I think it was, Amory Street, and there was a fellow out there lettering the window — "Real Estate Alphonse Roy", so I decided I'd meet him, and I stopped, and we became acquainted, struck it up pretty well, and we eventually became associated together in real estate for some time.

Q. This was in the 1950's? A. I was with Mr. Roy in '56 and '57, I believe.

* * *

[86] Q. Getting up to 1959 or 1960, did you hold any office in the organization in those years? A. Yes. I held office for about four years, I believe. I was treasurer, secretary. In 1960 I was vice-president of the Board, and in 1961 I was President of the Queen City Board of Realtors.

[87] Q. Coming up to 1963, were you still active in the organization? A. Yes. I was still active as a director. In fact, I was also director of the State Board at that time.

* * *

[88] Q. Will you tell the Court and jury what the circumstances were that led to your seeing the article? Just tell

them exactly what happened. A. All right. Well, of course, I had several of my insurance accounts question me about it. They knew, of course, that I had been associated with Mr. Roy, and some of them asked me if I had left him because I knew that he was a bootlegger, and others joked with me about it, kidded me about it, and —

• • •

[89] A. . . . And at the realtors meeting in 1961, I became the President of the Queen City Board in January, 1961, and I recall that during the social hour little groups — four or five here and there, you circulate about and talk about various things, and I was the butt of some jokes because of the fact I had been associated with him. Some of the boys kidded me in a friendly manner. And I recall at that time that we have also several banker members — they are associate members of the Board of Realtors — and of course, the boys themselves, the realtors, kidded me about it —

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[97] [Last question by Mr. Brown read]

Q. [By Mr. Brown] Mr. Gay, I think that you had told the circumstances up to a point where you were telling us that at a January, 1961 meeting of the Queen City Board of Realtors there was a discussion in small groups, and I think you said there were some associate members who were bankers who were there. Could you pick it up from there and complete the answer? A. I previously said the realtors themselves had jokingly mentioned it to me. Some of the bankers were a little bit more concerned about it, and I don't recall who they were. It's quite some time ago. This is general conversation. They wondered if the Board would do something about this fact that we had apparently an ex-bootlegger in the organization; and I perhaps told them at the time I thought [98] nothing would be done because I believe that Mr. Roy had resigned by then. So I heard this in various places, that Mr. Roy was a bootlegger, and I

asked the people how come, where they got the information. They either had read it in the newspapers or else they had heard it from friends who had read it in the newspapers; and it was perhaps almost a year later, I think, that I was a little concerned about it, a little curious, and I dropped in to see Mr. Roy one day and I told him that I was hearing these stories, these rumors that he was a one-time bootlegger, and I asked him where all these stories came from. That's where I first saw the article. Mr. Roy took it out and showed it to me.

Q. Now, in what you just told us you said what happened at a particular meeting of the Queen City Board of Realtors. Was this the only meeting at which the subject matter came up, or did it come up more than once? A. No, it came up again, as I recall, two or three years later. I recall at that time Mr. Roy, I believe, was running for Mayor in the city with another realtor who is presently the Mayor.

Q. Mayor Vallee is also a realtor and also a member of the Association? A. That's right. We were talking at the dinner table — in [99] fact, we had another realtor running for office, William Lynch, I think, in the same campaign, and we were kind of proud to have three of our realtors represented, running for an office in the city, taking an interest in civic affairs, and we thought it was quite a deal; and someone in the general conversation around the table says, "Well, there's one who hasn't got any chance. They won't elect a bootlegger, Mr. Roy." So this is probably two or three years later.

Q. Up to the present time, what do you say as to whether this discussion of Roy as a bootlegger has ceased — I'm not talking about presently during this trial but prior to the trial's start; was there still some discussion about it or not? A. No. There hasn't been any for some time. Of course, it has resumed again, and many of the people I had business with in former years remember I was with Mr.

Roy, and they wonder if this is true or not. I was approached once, I think, about six months ago by my brother, who lives in Connecticut, and he asked me if there was any truth in the fact that Mr. Roy had been a bootlegger at one time. He knew, of course, I was associated with him. And I asked him how come he knew about this living up in Connecticut, [100] where did he get the story, and it seems that he had heard it from his in-laws who live in the city here, and that his father and mother-in-law — they're both deceased now, but he had heard it from them some years prior to this, but he had never mentioned it to me, but he did a year or so ago — six months ago, perhaps. I haven't heard it too much now in the last few years, couple of years.

Q. Mr. Gay, this article the jury knows was published the 10th of September, 1960. Prior to that, while you were associated with Mr. Roy, did you give him a hand at all in political activities? A. Yes, I did. I think it was in '57. He ran for Register of Deeds, and at that time we were associated together, and, of course, I donated my car for a day and took people to the polls, and so forth; and yes, I did work for him at that time and other occasions. I don't remember what he was running for, but I would speak to people about him, he was running and if they would consider giving him their support I would appreciate it.

Q. Prior to the 1960 campaign in which this article was published, to what extent did you hear any discussion that Mr. Roy was or had been a bootlegger? A. I never heard any discussion. I had no inkling of it until [101] 1961. I never heard it before.

Q. You heard it in the period — A. The first time that I heard it was the January meeting of the Realtors, Queen City Board of Realtors, 1961.

Q. That would have been the January after the September election? A. Yes.

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[102] *Cross Examination . . .*

* * *

[107] XQ. . . . Just a couple more questions about the article. It was the newspaper Mr. Roy — when you first saw the article, it was in a newspaper article he showed you? A. Yes.

XQ. Was it from the Concord Monitor? A. Yes, it was.

XQ. And this was about a year after you first heard it discussed; is that right? A. Six months or a year. In between that time. It's six years ago. I don't recall exactly, but I would say something like that. Six months to a year.

XQ. Which in turn would mean at least a year after it was printed in the Concord Monitor? A. Yes.

[108] XQ. And the thing that caused this discussion that you heard was the reference to him being called a former small-time bootlegger? A. Right.

XQ. And people called you up and asked you, or your brother-in-law, or someone, if it was true or something? A. Yes. On the street. Several times. And in coffee shops. And I heard it so many times that I got curious, and I thought — I met Mr. Roy one day — I went to his office, in fact, and I asked him about it, and that's when he produced this article.

XQ. Well, your associations with Mr. Roy, at least in the real estate business, were good ones? A. Yes.

XQ. And you got along with him all right? A. Yes, I did.

XQ. And after this article came out, did you still get along with him fine? A. Yes, I do.

XQ. Still like him? A. Just as much as ever.

Mr. REYNOLDS: Thank you.

[109] *Redirect Examination*

[By Mr. Brown]

Q. You don't believe he was a bootlegger, do you? A. No, I don't. That's why I still like him. May I say one thing, please?

Q. I don't know. You can as far as I'm concerned. A. Why I don't believe he's a bootlegger?

* * *

[112] Q. . . . In what sense, Mr. Gay, did you understand, or did the people that were discussing this with you indicate they understood, the term "small-time bootlegger" was used in this article? What did it mean? A. A bootlegger is a person who either manufactures or keeps or sells illegal whiskey, trafficks in whiskey.

Q. And that is the basis upon which people were making these comments? A. That's right. And, of course, it was a criminal offense, [113] a federal offense, in those days to do those things.

Mr. BROWN: I have no further questions.

Recross Examination

[By Mr. Reynolds]

XQ. You got out of high school, I gather, in 1934? A. Yes.

XQ. And 1934 is when Prohibition ended? A. I believe so.

XQ. But you grew up going through at least part of grammar school and high school in the Prohibition era; isn't that right? A. Yes.

XQ. And where was this that you grew up? A. I lived in Derry until the age of fifteen, started high school in Pinkerton over there, and then we moved to Manchester. I lived on Second Street a while, and then we moved to the east side, Belmont Street.

XQ. How long did you live on the west side? A. Four years.

XQ. And how old were you in those four years? A. Between the age of fifteen and nineteen.

XQ. And this is while you were in high school? A. Yes.

XQ. Did it come to your attention that you could — or at least [114] adults could get a drink if they wanted to?

A. I was aware of the fact, sir. I think so, yes. I knew what bootlegging was in those days. I wasn't any part of it, but it's in the dictionary. Everybody knows that.

XQ. A lot of people were selling liquor and a lot of people were buying some; isn't that so? A. Well, I assume, yes.

XQ. Did you think that was a pretty awful thing, to sell and buy a drink? A. I was taught by my folks that it was, yes, and any person that trafficked in liquor was a criminal. That's what I was told as a youth.

XQ. Is that what you think today, that its such a horrible thing? A. I think anything that is a criminal offense against society — and this was the law in those days, and if you violated it, a federal offense, you were a criminal, and it wasn't a good thing to do at all. I think perhaps if I had a good listing to show a fine home in the north end and I was going to show it and I learned it was for a bootlegger, I wouldn't do it.

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[119] TESTIMONY OF LORENZO P. GAUTHIER

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Direct Examination . . .

• • •

Q. And your occupation, or occupations? A. Well, I'm a drug clerk, Waumbec Mill at night; broker, insurance broker, days; race track in the summer; member of the House of Representatives; piano player.

Q. How long have you been in the House of Representatives? A. Well, it's either eleven or twelve terms — twenty-four years.

Q. And you've just been elected to some other office? A. I have just been elected State Senator.

Q. How long have you lived in Manchester? A. All my life.

Q. Do you know Mr. Alphonse Roy? A. In fact, I was born where he lives now.

Q. And you've known him for a long time? A. All my life.

Q. This case we're involved in arises out of a — or involves a column written by Mr. Pearson. I'd like to show you a [120] copy of it, a copy of the paper, published on September 10, 1960. Do you remember reading that article? A. Yes, I did.

Q. Do you remember approximately when you read it? A. Well, this must have been — this was published, I think, two or three days — three days before primary.

Q. Yes. And did you read it at about that time? A. Well, somebody showed me the article in the paper.

Mr. REYNOLDS: What was the answer to the question as to when he read it?

The WITNESS: Either that afternoon that it came out in the paper or the following day.

Mr. REYNOLDS: Thank you.

Q. [By Mr. Guenther] Now, if I may see that again just a minute — at one point here in the article you see a reference to Mr. Roy as a former small-time bootlegger. When you read that, what did you understand Mr. Pearson to mean when he called Roy a bootlegger? A. Well, in those days they used to call bootleggers those who were selling liquor during Prohibition, which was illegal, against the law. That's what I understood.

• • •

[121] Q. Now, it also talked about Mr. Roy and a Mr. Frank Sullivan. What did you understand the article to be saying about that?

• • •

A. Well, according to the article, Mr. Sullivan was a straw candidate put in by Alphonse Roy. That's what it reads.

Q. When you read the article, did you understand — or what if anything did you understand it to be saying about Styles Bridges in this connection? A. Well, I guess Styles Bridges, according to this, wanted Sullivan to be in so to split up the vote, create confusion.

Q. All right. Now, you said if you — you said that you saw [122] the article approximately the time it was published. Following that, did you hear any conversations about the article? A. Well, you never hear anything about good things but bad things you always do. That was the talk of the town. You could hear it everywhere.

Q. Discussions about this article? A. That's right.

Q. What sort of thing were people saying, do you remember? A. Well, a lot of them never believed it. Some of them said that they never knew that he had been a bootlegger.

Q. And what else did they say, if anything? A. Well, they still didn't believe it, but some of them apparently believed it because they didn't vote for him.

Mr. REYNOLDS: Well, I object.

The COURT: Sustained.

A. [Continuing] Some of them said if they had known he had been a bootlegger, they would never, never vote for him.

Mr. REYNOLDS: My objection to the answer.

Mr. GUENTHER: That's a different answer and I think it's proper.

The COURT: The first one may be stricken. The second one may stand.

[123] Mr. REYNOLDS: Exception.

The COURT: Exception noted.

Mr. GUENTHER: I'd like to except to the striking of the first answer.

The COURT: Your exception is noted.

Q. [By Mr. Guenther] Do you remember that Mr. Roy ran for office again in 1963 seeking the nomination for Mayor? A. Yes.

Q. Did you hear any conversations about this article and what it said about Mr. Roy at the time of that campaign? A. That was brought out again. The same thing was brought out again.

• • •

[124] Q. [By Mr. Guenther] Prior to the time this article was published, had you heard stories that Mr. Roy was a bootlegger? A. No.

• • •

[127] *Cross Examination . . .*

XQ. Can you tell me when you were born? A. When I was born?

XQ. Yes. What year? A. 1908, 27th of July. Do I look that dumb or what?

XQ. No. I was just trying to find — I'm sorry. I just wanted to find out how old you were in the '20's growing up. A. Well, I was a young boy.

[128] XQ. Because we've had some testimony about what was going on in certain parts of the city in the '20's and during Prohibition. I didn't know whether you might have been too young to know about that, that'll all. A. Well, I was quite young.

XQ. Well, in other words, by 1930 you would have been twenty-two years old? A. Twenty-two years old.

XQ. And then you went to Concord in around 1944, is it? A. I was elected for one term — the first term, I think it's either — I think it was in 1931 or '33. I think '33.

XQ. '31 or '33 for the legislature? A. I mean I was elected in, I'd say, '32 or '34, but you don't, you know, you're not sworn in until the year after.

XQ. In the late '20's and early '30's, did you know Mr. Roy? A. Very good. In fact, he was a member of the House with my father.

XQ. He would be more of a friend of your father than you. A. I've always been a friend of his all my life.

XQ. Well, I know you'd be a little younger than he was, and I didn't know whether — well, in '31 and '33, did you live near Mr. Roy or in the same ward? A. Yes — no. I lived in 13. He lived in 12.

[129] **XQ. Did you know the family pretty well? A. The family was a friend of my family.**

XQ. Did you know Manuel and Emile? A. I know the whole family.

XQ. Did you know Manuel and Emile were in the bootlegging business? A. Well, I never bought any so I couldn't say that. That's hearsay.

XQ. Well, I know. Did you ever hear it, I mean rumors? A. That's what some people say, but I don't go for that, for hearsay.

XQ. Right. You don't know that, but that's what some people say? A. That's right. Because I was too young to go to them places, and I never did.

XQ. During some of Mr. Roy's campaigns in the '30's, did you hear some of that hearsay about him then? A. No.

XQ. You never heard some people just say those rumors — I'm not saying it's true; I'm just saying did you hear those things? A. No. If I did, I'd tell you the same thing. No.

XQ. Never talked about — A. Naturally, I was a

friend of his, so they wouldn't tell me those things. If they did, somebody would say it to [130] somebody else. They wouldn't say it to me because they know I would report it to him.

XQ. You never heard any stories? A. No. Not to me. Not as far as I'm concerned.

XQ. But you did hear stories about Manuel and Emile? A. Well, I did, but like it's hearsay so I don't buy that.

* * *

[132] RICHARD BLALOCK

* * *

Direct Examination

* * *

Q. And what's your occupation? A. Editor of the Portsmouth Herald.

Q. And you have been active in that capacity for how long? A. Six or seven years as editor.

Q. Before that, were you similarly associated with that [133] newspaper? A. I was managing editor for about twelve years prior to that.

Q. Mr. Blalock, did you have any special training for your career in journalism? A. No academic training. Experience only.

Q. How long have you been a newspaper man? A. Thirty-two years.

Q. And in what capacities other than as editor and managing editor? A. Reporter and copy reader.

Q. In September of 1960, were you the editor of the Portsmouth Herald at that time? A. Yes, I was.

Q. I wanted to ask you, Mr. Blalock, about a September 10, 1960, publication of an article by Drew Pearson —

* * *

[201] Q. Now, you said, sir, that you did publish the Ballot Law Commission report as a news item at the time? A. Actions of the Ballot Law Commission.

Q. You are aware that there was no suggestion in any of those reports that Alphonse Roy was a bootlegger? You know that? A. Well, yes. I would presume so.

Q. You've also said that you recognize that you have a function to inform the public with regard to political campaigns. Now, let me ask you: Do you also recognize that you're supposed [202] to do it truthfully?

Mr. Millimet: I object, your Honor. What this man recognizes is not the issue.

Mr. Brown: My brother has opened this up. He has gone into what this man's function is.

Mr. Millimet: I haven't gone into anything such as my brother is trying to raise. I've only gone into the question of the subject matter of the political campaign, that's all.

The Court: Well, I will allow the witness to give his opinion as a newspaper man.

Mr. Millimet: Subject to my exception.

A. Factual presentation of the news is our primary concern.

Q. Truthful? A. Factual.

Q. Factually true? A. Yes.

Q. With regard to the comment in the column that Roy was a former small time bootlegger, did you have any information that would lead you to believe that that was probably true? A. No. I had no knowledge.

[203] Mr. Millimet: Well, your Honor, as previously ruled, this man's knowledge is not the issue, and I ask the jury be so instructed, and I ask it be stricken.

The Court: Sustained.

Mr. Foreman and members of the jury, you will disregard it. Strike it from your mind.

Mr. Brown: Exception, your Honor.

The Court: Exception noted.

Q. [By Mr. Brown] Generally — not with respect to this article, but generally, as a newspaper publisher, if you don't know whether something that comes to you is true or false, what do you do before you publish it? Generally?

Mr. Millimet: Excuse me. Have you finished?

Mr. Brown: Yes.

Mr. Millimet: I object. This has all been ruled on. I object to it.

The Court: Not what this witness did.

Mr. Millimet: Not what this witness does, either.

The Court: Not what this witness does. If he has knowledge of the general procedure in the area, he may go [204] into it.

Mr. Brown: All right.

Q. [By Mr. Brown] Let me ask it that way, Mr. Blalock. Generally, in this area, New Hampshire, newspaper publishers, if a factual report comes to you that is obviously an attack upon a person and you don't know whether it's true or false, what generally do newspaper publishers in this area do?

Mr. Millimet: I object, your Honor. It's not the test in this case.

The Court: Not what the witness did but what was generally done. He may answer it if he knows.

Mr. Brown: You may answer.

Mr. Reynolds: Exception, please.

The Court: Exception noted.

A. If the facts are not documented or we feel there might be reason to question them, we question them.

Q. What do you mean, question them? A. Well, we try to establish the fact.

Q. One way or the other? A. Right.

Mr. Millimet: If the Court please, I ask that the answer

be stricken. This is exactly [205] what the Court has previously ruled on. He is talking about what he did, what he does. It's not the test. His information was not the information of the Concord Monitor. That's the basis of our objection. We will have evidence about the information of the Concord Monitor, but it's not this man's information.

The Court: I understood the witness to be giving the answer as to what was generally done. As such it may stand.

Mr. Millimet: Not as bearing upon what he knew?

The Court: What he knew or what he did.

Mr. Millimet: I understand that has nothing to do with this case.

The Court: That is correct.

Mr. Brown: That has what? I didn't get it.

Mr. Millimet: What this man did, what this particular editor did, I understand is not relevant to this case.

Mr. Brown: Well, I object to that statement. I think to the extent that it is in [206] evidence that it is material, and to the extent that it's been excluded, of course, it wouldn't be considered by the jury.

Mr. Millimet: Well, I took the Court's ruling — May I have Mr. Brown's question again?

[Question read]

Mr. Millimet: All right. Thank you. I just wanted to hear the question, your Honor. I'm satisfied.

Mr. Brown: If he's satisfied, I guess I better leave it alone. I thought he suggested that the answer was contrary to what the question was.

The Court: The question and answer may remain in the record.

Mr. Brown: I have no further questions.

Mr. Millimet: I have no further questions.

[Witness excused]

[1] Wednesday, December 14, 1966

TESTIMONY OF ROBERT E. EARLEY

* * *

Direct Examination

* * *

Q. And your profession is what? A. Law.

Q. You're an officer of this Court, as the rest of the attorneys are? [3] A. I am.

Q. Mr. Earley, I don't want to be letting out any trade secrets, but how old are you? A. I'm seventy.

Q. In addition to engaging in the practice of law over the years, would you advise the Court and jury to what extent you have held public office and about when? A. Well, I was elected to the House of Representatives in the New Hampshire Legislature in the year 1920, and I was City Solicitor of Nashua in '28, '29, '30 and '31, I believe, and I've been a delegate to many national Democratic conventions, a member of several constitutional conventions in New Hampshire, and I've been a candidate for the office of County Solicitor and have been defeated. I ran for the Mayor's office in the city of Nashua and was defeated back in '52 or '3, I believe it was.

Q. Mr. Earley, you're a Democrat, I take it? A. Yes.

Q. Have you held positions in the organization, the state organization, the county organization of your party? A. Yes. I have held office as the city chairman in Nashua and as the state chairman of the New Hampshire Democratic Party back in 1940 through to 1944.

[4] Q. And are you still to some extent active in the organized work of the party? A. I try to participate in elections. I was a delegate to the 1962 Democratic National Convention at Atlantic City.

* * *

A. I'm in error. It was in '64.

Q. In this case we're trying, Mr. Earley, we're trying a complaint brought by Alphonse Roy against Drew Pearson because of matter published in Mr. Pearson's column. How long have you known Mr. Roy? A. I believe I first became acquainted with him back in 1926. I was then a candidate for County Solicitor, and I had occasion to visit with him at that time.

[5] Q. From the time through until the Roy-Jenks campaign, were you generally aware of what Mr. Roy's political activities were? A. Yes.

* * *

[17] Q. ... Who did the Congress determine was the rightful representative? A. Roy was finally seated.

Q. And after that, Mr. Earley, bringing your attention to the next campaign, what happened between these two gentlemen in the campaign of 1938? A. Jenks was elected in that campaign.

Q. Who was the Democrat nominee? A. Roy.

Q. I think you told the Court and jury this morning that both Roy and Jenks got 51,000 some-odd votes in the '36 campaign. Approximately how many votes did Roy get in the '38 campaign? A. I believe around 44,000.

Q. Now, Mr. Earley, what do you say as to whether those two campaigns, the two campaigns between Roy and Jenks, were they hotly contested, seriously fought out? A. I would say they were. Very hard fought campaigns.

Q. Tell the Court and jury to what extent during those two campaigns there were any reports circulated that Mr. Roy had been a bootlegger. Was there any such report? A. I never heard of any.

* * *

[18] [By Mr. Brown] Mr. Earley, are you familiar with the fact that Alphonse Roy was a candidate for Sheriff in this county in the campaign of 1944? A. Yes.

Q. Against LaPlante and others? A. Yes, sir.

Q. At that time, what position did you hold in the state organization of your party? [19] A. I was the state chairman at that time.

* * *

[22] Q. Now, again, Mr. Earley, with respect to the situation in 1944, was that campaign and that recount and that procedure, was that a hotly contested election? A. It was.

* * *

[23] Q. Now, within your personal knowledge, sir, in the campaign of 1944, to what extent, if at all, were there reports that Alphonse Roy had formerly been a bootlegger?

* * *

[24] Q. Yes. I heard of no such rumors.

Q. Now, have you read the Pearson column of September 10, 1960? A. I have.

Q. Did you read it at the time of its original publication? A. I did.

Q. What was your understanding, Mr. Earley, of the reference in that article which states, with regard to Mr. Roy, that he was a former small-time bootlegger? What was your understanding of the terminology? What did it mean? A. Just what it said. I understood it to implicate just what its wording described it as being.

Q. Well, what was the understanding that you attached to the word "bootlegger"? A. Well, to me it was false, if that's what you—

Q. No. That isn't what I'm asking. A. Sorry.

Q. As you read it, as you understood it, what did you understand the term to imply? What conduct was referred to, in your judgment, by calling the man a bootlegger? A. That he was a violator of the law.

[25] Q. In what regard? A. In that he had traded in illegal trading in liquor, selling liquor.

Q. And I think you said just a moment ago—your own impression—did you believe it or not? A. I did not.

Q. And do you now? A. I do not.

Q. To what extent, Mr. Earley, did you hear the article discussed by others after it was published? Have you heard it discussed by others? A. Not to any appreciable extent.

Q. It wasn't a subject of discussion in Nashua, to your knowledge? A. Not to my knowledge.

Q. Do you recall, sir, whether the article also suggested that there was other conduct of Mr. Roy's that was unfavorably commented upon in the article? A. Yes.

Q. And what other conduct of his did you understand the article to be critical of? A. Well, that he had put certain candidates in the race in order to assist the Senator Bridges.

* * *

[32] TESTIMONY OF ANDRE J. BARBEAU

* * *

Direct Examination

* * *

Q. What is your occupation? A. I'm an attorney and Clerk of the Manchester District Court.

Q. In that capacity, do you have custody of the records of the Court? A. I have the custody of the records of the Manchester District Court and its predecessor court.

Q. I show you a document. Would you tell us what this is, please? A. This is a statement which I prepared this morning concerning my search of the records of the Court of which I have custody of the records concerning one Alphonse Roy, whose date of birth is October 26, 1897, as requested by you.

Q. And what were you asked to look for? A. I was asked to search to see if any criminal complaint or charge of offense or violation of law had ever been filed in that court or its predecessor court against Alphonse Roy.

Q. Did you arrive at a conclusion?

* * *

[35] A. According to my search, I found no record of any complaints ever having been filed or any charges ever having been brought against the said Alphonse Roy for any charge whatsoever.

* * *

[47] TESTIMONY OF VICTOR J. TETREAULT

* * *

Direct Examination

* * *

Q. How long have you lived in Manchester? A. Well, I'd say mostly all my life.

Q. Do you know Mr. Alphonse Roy? A. Yes.

Q. You'll have to speak up a little. A. Yes, I do.

Q. And for how long have you known him? A. Well, I've known him, well, since political days, from way back. I was a youngster, and my father used to be a campaign director for the Democratic Party, and naturally he used to come up the house.

Q. You know him through your family? A. Yes. Through the family.

* * *

[48] Q. At that time do you remember reading a Drew Pearson column which talked about Mr. Roy, among other people? A. Yes, I do.

Q. Do you remember what newspaper you saw it in? A. Well, it's either the Concord or the Claremont paper. I'm not sure. We used to have a lot of bowlers come up there with different kinds of papers and leave them around.

Q. But you saw it in Claremont? A. Pardon?

Q. You were in Claremont when you saw it? A. Yes.

Q. Did you have any discussion with anybody up there

about it? A. Just one person, while I was reading that. I told him that I knew this gentleman and I was shocked to hear about it.

Q. Now, do you remember the article, among other things, referred to Mr. Roy as a former small-time bootlegger? A. Yes.

Q. When you read that, did you believe that? A. Well, I didn't know what to think.

Q. Well, do you mean by that you did or you didn't believe it? A. Well, as far as I was concerned, I didn't believe it. I didn't know.

* * *

Q. ... Had you ever heard, prior to seeing this article, that he was a bootlegger? A. I never did, no.

Mr. Guenther: You may inquire.

with, you know.

Cross Examination

[By Mr. Millimet]

XQ. How old are you, Mr. Tetreault? A. Forty-nine.

* * *

[51] TESTIMONY OF EMILE COURTOIS

* * *

Direct Examination

* * *

Q. What is your occupation? A. Roofer.

Q. Are you employed by a roofer? A. Self-employed.

Q. How long have you been in that business? A. Twenty years.

Q. In Manchester? A. Yes.

Q. Do you know Mr. Alphonse Roy? A. I know Mr. Alphonse Roy, yes.

Q. And for how long have you known him? A. Well, I don't know him personally. I've known of him since around 1940.

Q. You say you don't know him personally? A. Well, I know him to say hello to or stop and shoot the breeze with, you know.

Q. Not a close personal friend? [52] A. Not a close personal friend.

Q. Now, Mr. Courtois, we're concerned here with an article written by Drew Pearson, published on September 10, 1960, in the Concord Monitor and other papers, which referred to Mr. Roy as a former small-time bootlegger and had some other discussion about Mr. Roy. Did you see that article when it was published? A. Not when it was published, no.

* * *

[54] Q. . . . You started, Mr. Courtois, to recount the conversations you heard on primary day. What was it that you heard? A. Well, there were instances where some of the people were talking. They said about a certain article out of the newspaper, they said, "It must be true that Alphonse Roy had been a bootlegger because it was written in—it was in Drew Pearson's column."

Q. These were people that you— A. These were people I was taking to the polls.

Q. Talking to you? A. No. They were having conversations—you didn't pick up [55] just one. Ordinarily there was three or four in the car.

Q. Did these people indicate whether or not they believed what they read? A. Well, I really don't know, but they seemed to think it might be true.

Q. This was in 1960. Since that time, have you heard any conversation relating to this article and the charge that Mr. Roy was a former small-time bootlegger? A. Well, I might have heard it a few instances in different social clubs where the name of—you know, you start talking politics

and the name of Alphonse Roy would come up. The bootlegging angle of it would come up.

Q. And for how long—has this continued until recently? A. Well, I think if you talked about it today you'd get the same response.

* * *

[56] Q. [By Mr. Guenther] Well, Mr. Courtois, of course it's in the news because of this trial, but a month ago before the trial started— A. Well, this was, well, let's say six months ago you'd get the same result.

Q. You'd what? A. Six months ago you'd—I'm not talking about since the trial started.

Q. You'd get the same result? A. You'd get the same result.

Q. You've heard it several times? A. I've heard it several times, yes.

Mr. Guenther: You may inquire.

Cross Examination

[By Mr. Millimet]

XQ. Mr. Courtois, where were you driving? A. I think I was working out of headquarters.

XQ. Whereabouts was that in 1960? A. If I'm not mistaken, it was on Elm Street.

XQ. What wards did you go to? A. I was sent to all different wards and shoe shops and mills.

XQ. Pardon? A. Shoe shops and mills. You know, when they come out of work—

XQ. You were a paid worker or a volunteer worker? [57] A. I volunteered, sir.

XQ. Your own car? A. My own car.

XQ. There were a great many others working also? A. Oh, yes. Very many.

XQ. This was a common practice of the Democratic Party? A. It sure is.

XQ. Now, you say that you had heard something about this. Have you told us all that you heard about it that you can remember? A. This is all I know.

XQ. That's all you can remember about it? A. That is, yes.

XQ. And you said that whatever you heard more recently has been in the clubs? A. In the clubs, yes.

XQ. Social clubs? A. Social clubs, yes.

XQ. Where people are drinking? A. Where they sit down and talk and have a few drinks, sure, that's right.

Mr. Millimet: That's all.

[Witness excused]

* * *

[62] TESTIMONY OF ALPHONSE ROY

* * *

Direct Examination

Q. What is your full name? A. Alphonse Roy.

Q. And where do you presently live? A. 76 Sullivan Street.

Q. How old are you? A. Sixty-nine.

* * *

Q. And where were you born, Mr. Roy? A. Born in Canada.

Q. How old were you when you came to the United States? A. About three years old.

Q. And when you came here, sir, where did your family make its home? Where did you live after you came here? A. On Cartier Street.

[63] Q. And at what number? A. I believe it was 228 Cartier.

Q. And for how long, Mr. Roy, did you live at that address, approximately? Until about when? A. Many,

many years, but I am unable to give you the exact number of years.

Q. Until you were an adult? A. Oh, yes.

Q. Where were you educated? A. Manchester.

Q. And how many years of schooling were you able to get? A. Grammar school.

Q. What was the occasion for your ceasing school? A. Fourteen years of age I had to go to work in the mill.

Q. And in what mill? A. Number 11 Amoskeag Mill.

Q. Well, let's see, Number 11 is the mill that is on the west side on one side or the other of the Notre Dame Bridge, isn't it? Which side of the bridge, south side? A. That would be on McGregor Street.

Q. And in what capacity did you go to work in the mill? What job did they give you? A. In the slashing room.

[64] Q. How long did you stay there? A. Many years.

Q. At the end of the period of your working in the mill, what was the job you were holding down? A. There was a strike in the Amoskeag Mill in those days, and we had to look for some other kind of work. I had a friend by the name of Beauclair, Albert Beauclair. He was a real estate agent, real estate and insurance. I started to work with him.

Q. And about when was that, Mr. Roy—you had a big strike over there in '22? A. Yes.

* * *

Q. Mr. Roy, about what year was it when you started with Mr. Beauclair? A. Well, it's hard for me to remember, but it was—I don't [65] know. Probably '24. Something like that.

Q. Before you left the mill to go into the real estate and insurance business, just before you left the mill, what was your job in the mill? A. Slashing room. Sort of a—they call it a dresser. Making warps for the weavers.

Q. All right. Now, I want to ask you this, Mr. Roy: You have told us that your going to school ended with grammar

school. Now, what if anything did you do after that to further your education? A. Well, I tried to educate myself as much as possible, and fortunately I had a friend by the name of Langford—

Q. Langford? A. Harry Langford, who is a college graduate, and he was teaching me as much as possible.

Q. Now, how did that come about? A. For two or three years he was living in my neighborhood, and I used to go to his home. We used to go to the library, and I studied as much as possible. And after he left town I continued to study. I did a lot of reading. I tried to learn as much as possible.

Q. Did you ever get around to going back to any formal schooling as a student in an institution? [66] A. No, never.

Q. All right. Tell me this: Had you married before you went with Beauclair? A. No. I was single.

Q. Had you entered public life before you started working with Mr. Beauclair? A. I didn't get that.

Q. Had you entered public life? Had you been elected to any office before you went with Mr. Beauclair? A. The best of my recollection, I ran for the legislature sometime in '24 or '25.

Q. And was that before you went with Beauclair or not? A. Just about the time that I—

Q. When, approximately, did you marry? You are married now? A. That's right.

Q. When did you marry? Your wife would be ashamed if you didn't remember. When was it? A. Well, I'm sorry. I can't give you the exact year. Probably twenty-five years?

Q. You've been married about twenty-five years? A. [Witness nodded]

Q. Have you had any children? A. We had two.

[67] Q. And are they living? A. [Witness shook his head]

Q. You ran for public office on several occasions after the first occasion that you've referred to; that's so, isn't it?

A. You mean after the legislature?

Q. Yes. You've run for public office numerous times since then? A. I ran for Alderman. I was elected Alderman in Ward 12.

Q. Yes. When was that, do you recall? A. I believe it was in '28. I'm not positive.

Q. Well, Mr. Roy, what are these sheets of paper? What do they show, do you recall? A. That's the offices I've held.

Q. Mr. Roy, is this a list of your major political campaigns with the results as they appear in the Red Book? A. That's right.

Q. From the first time you ran for Representative— A. That's right.

Q. —through—what was the last time that you ran? For Mayor, was it? A. 1963 I aspired for Mayor.

* * *

[141] Q. [By Mr. Brown] Mr. Roy, at the end of the day yesterday, I was starting to ask you about your political career. Do you claim to be able to remember all the campaigns you have been in the last forty years of so? A. I'll try.

Q. Do you try to keep those things in your head, or how do you refresh your own memory as to when you ran in these various things? A. Well, I had to look up the Red Book and look it up.

[142] Q. So far as you're concerned, the Red Book figures are accurate as to who you ran against and when you ran and for what offices? A. That's right.

* * *

Now, what was the first time you ran for public office?

* * *

A. 1924. I aspired for a member of the legislature, Ward 12.

Q. And won? A. I was successful.

Q. The next campaign after that was when? A. 1926. I was reelected, member of the House.

Q. After that, the next time? A. 1928. I aspired again for Representative.

[143] Q. And won? A. Yes.

Q. So that those six years you were the Representative of your ward at the state legislature? A. Right.

Q. What office did you run for next? A. 1931. I ran for Alderman of Ward 12, Manchester.

Q. Did you win? A. Yes.

Q. Next campaign after that, what did you run for? A. 1932. I ran for the Governor's Council, the Third District.

Q. With what result? What was the result? A. I won.

Q. All right. So you are now on the Governor's Council. What did you run for next? A. 1933. I aspired for Mayor in the City of Manchester.

Q. And with what result? A. I lost the nomination.

* * *

[144] Q. That's the first time you lost? A. [Witness nodded]

Q. What did you run for next? A. Again I ran for the Governor's Council. 1934.

Q. And with what result? A. I won.

Q. So that from 1924 up through 1936 you held public office all the way through; is that right? A. That's right.

Q. What was your next campaign, sir? A. In 1936 I became a candidate for Congress in the Second District.

Q. And who was your opponent on that occasion? Who did you run against? A. You mean in the primary?

Q. Well, who was your principal opponent in the primary? A. John Sheehan.

Q. The attorney, Jack Sheehan, we call him? A. Was then County Solicitor.

Q. And you won the primary? A. Yes.

Q. And you then went into the election in which you and Jenks had the contest that ended up in Congress? [145] A. That's right.

Q. And you were finally seated as the Congressman? A. After a long, contested election, I was seated by Congress June 9, 1938.

Q. And thereafter did you run again? A. 1938 I ran for Congress again.

Q. Again against Jenks? A. That's right.

Q. How did you come out that time? A. I lost.

* * *

[146] Q. Did you run against Jenks again? A. 1940.

Q. Now, how did that come about? A. I was renominated without opposition, and I lost to Mr. Jenks.

* * *

[148] Q. Now, after that, Mr. Roy, when did you next run for public office and for what public office? A. 1942 I aspired for Sheriff of Hillsborough County.

Q. Did you win the primary? A. I lost in the primary.

Q. What did you run for next? A. 1944 I ran again for Sheriff.

Q. How did that one end up? A. The first returns gave me a majority of six votes.

Q. A recount then? A. Then they had a recount and two discrepancies showed up against me, which gave the nomination to my opponent, the recount.

Q. By how many votes, do you recall? A. Fifty votes.

Q. And then your opponent unfortunately died? A. Mr. LaPlante died ten days after.

Q. And whose name was put forward to fill the vacancy? A. I was named by the state committee to fill the vacancy.

Q. Did your name go on the ballot? [149] A. No. Someone made a protest and they made an appeal to the court claiming that the county committee had a right to fill the vacancy instead of the state committee, and the ruling of

the court was that the county committee had the right, so I lost out.

Q. And the county committee named Sheriff O'Brien who is still our Sheriff? A. That's right.

Q. Did you run for any elective office in '45 or did you do something else? What happened in 1945? A. In 1945 I was nominated by President Truman for United States Marshal in New Hampshire.

* * *

[156] Q. ... Mr. Roy, you're not supposed to, as a witness, testify to what other people told you but only to things that you know yourself, you see. Now, regardless of what Governor Murphy may have told you, from your own knowledge, who were the two endorsers the first time your name went forward? A. Federal Judge Aly Connor; the late District Attorney, Dennis Sullivan, who later became Judge of the Superior Court.

Q. Now, you were eventually confirmed as Marshal? You did serve the first time? A. Yes.

Q. When your term ran out and the question came up as to a second term, who was the national committeeman the second time around? A. Emmet Kelly from Berlin.

[157] Q. Who were your two endorsers in the second time around? A. I don't remember.

Q. Do you remember one of them? A. It seems at that time that Mr. O'Brien and Mr. Scott was one of the fellows who prevailed on Mr. Kelly.

Q. This is the same Joe Scott that came in here and testified? A. That's right.

Q. And Mr. O'Brien who was in business at the same location with him? A. Yes. He was one of the leaders in the party.

Q. And that would have been what—what year was it that your second term started? A. 1949.

Q. And you maintained that office until when? When was

your second term over? When were you replaced? A. 1963.

* * *

A. '53, rather.

Q. And were you replaced by a Democrat or by a Republican? A. By a Republican.

Q. Sheriff Colbath? A. Yes.

Q. Mr. Roy, after your tenure as Marshal was over, what did you [158] run for next? A. I aspired for Mayor, the City of Manchester.

Q. With what result? A. It was a non-partisan election and I lost.

Q. After losing that contest, what did you run for next? A. Is that 1956, was it?

Q. Well, you got done being Marshal when, '53? You ran for Mayor what, the same year or the next year? A. 1956 I ran for Register of Deeds.

Q. Now, in that race in 1956 for Register of Deeds, what—that was a race in which there was a contest in the primary? A. Yes.

Q. And did you win or lose? A. What's that?

Q. Did you win or lose? A. I lost.

Q. What was the next campaign after that? A. 1958. I ran for Congress again.

Q. You were back looking for the same Congressional seat that you won in 1936? A. Right.

Q. Who won the primary? A. I was nominated.

[159] Q. Who did you run against, do you remember, in the general election? A. Congressman Chester Merrow.

Q. And who won? A. Mr. Merrow won.

Q. How many votes did you get in the general election in 1958? A. 44,000 votes.

Q. And the next election after that was the 1960 election that was commented upon in this article? A. That's right.

* * *

[170] Q. All right. Now I want to get back to the 1960

political campaign. Do you know when you decided to run for major office in 1960, when you made your mind up? A. I was decided to run for Congress again.

Q. Do you know when? A. I cannot say the exact date.

Q. You had run for Congress two years earlier? A. That's right.

Q. And you say you decided to run for it again? A. That's right.

* * *

[171] Q. Mr. Roy, do you recall what day you filed? A. I filed for Congress July 18th.

Q. At that time do you recall whether or not anybody else had filed ahead of you? A. I don't believe so.

Q. Well, if the record shows that a Joseph Myers—did you know Joe Myers? A. Yes, sir.

Q. Democrat? A. Yes.

Q. Did he run that year? A. Yes. He was a candidate.

Q. If the record shows that he filed before you did, would you go by the record or by your recollection? A. I would go by the record.

Q. All right. After you filed on the 18th, did someone else file after you had your filing? A. Yes.

[172] Q. Who? A. Romeo Champagne.

Q. From what section of the voting strength—Democrat, I'm talking about—would Champagne draw, you draw and Myers draw? What was the situation with the three of you? A. We were all in the same ward, Ward 13.

* * *

[173] Q. ... Tell us, Mr. Roy, what happened as between you and Champagne in connection with the Congressional race from the first time you talked to him about it until the end. Tell us the whole story. A. Well, I talked with Mr. Champagne several times. He was always undecided—

* * *

A. [Continuing] There was a certain group that wanted

him to run. Apparently they decided him to run. I had filed then. I didn't feel like running against Mr. Champagne because two years previous I became a candidate for Congress and his name was mentioned several times, and I took it upon [174] myself to go and see him at his summer home in York Beach. I asked him if he really wanted to run. He said they were asking him to run but in view of the fact that I was in the race he had decided not to run.

Q. He stepped aside, so to speak? A. That's what he said at that time. Now, in view of this statement he had made, when he filed after me, I felt in all due justice to that fellow I should not run against him, especially since he was in my own ward and I had known him for years. He was a personal friend of mine. And more, Mr. Myers was chairman of the city committee and also came from my ward. I felt that it didn't make sense to have three major candidates in one ward. I decided to give up the Congressional race and file for the Senate.

* * *

Q. You made up your own mind? A. I made up my own mind.

Q. All right. We have an exhibit, Mr. Roy, a typed letter with your signature on it, to the Secretary of State, in [175] which it is stated that you want to withdraw from the Congress race and go into the Senate race. How did you get that withdrawal and changeover letter—how did you get it up to him? A. I saw the Secretary of State. I told him I wanted to withdraw from the Congressional race and file for the Senate.

Q. Mr. Roy, I have shown you the exhibit that the Secretary of State people sent down with a photocopy of a typed letter. Did you sign such a letter and get it up there? A. I did.

Q. How did you get that letter into the hands of the Secretary of State? A. In person.

Q. You delivered it? A. Yes.

Q. So it wasn't mailed? A. No.

Q. And did you deliver it on the date that is written on the letter, on the 25th? A. I believe I did, yes.

Q. When you filed for the United States Senate, sir, what did—why did you do it? What were you trying to accomplish? A. Kindly repeat that.

[176] Q. Why did you file for the Senate? What were you filing for? What was the reason? A. Well, I felt that I had just as much chance to be nominated as anyone else because I was just as well known as any of the candidates that had been mentioned.

Q. Did you go into the contest hoping to win? A. Yes, sir.

Q. All right. Shortly after you filed for the Senate, Frank Sullivan and two other fellows came in and also filed. You recall that happening? A. That's right.

Q. What did you have to do with their filing? A. Absolutely nothing to do with them.

Q. You knew Sullivan, did you? A. Very well.

Q. What about the other two fellows? Did you know them? A. Don't know McCarthy. Mr. Robinson was at the Ballot Law Commission, and he stated before the Ballot Law Commission he didn't know me, and I didn't know him myself.

Q. In Pearson's article, Mr. Roy, there's some comment about a call that you made to Ralph Lavallee. Did you make a call to Lavallee? A. I did.

[177] Q. And was this before you filed? A. The best of my recollection, when I called Lavallee I was a candidate for Congress.

* * *

Q. You don't know whether you'd filed or not, or do you? A. I cannot say.

Q. All right. Tell the Court and jury what that call to

Lavallee consisted of, why you called, what was said and what wasn't said. What happened? [178] A. Ralph Lavallee was always a friend of mine. When he started in politics, he came to me for assistance. I had a little organization in his town. I used to call on him occasionally when I was aspiring for public office for assistance. I called him that day and I told him I was a candidate for Congress. I asked him if he could assist me some with his friends. I remember him saying that he was in a very peculiar position because the County Commissioner in Manchester had opposition. He had to devote all his time to his candidacy and he was told not to bother with the major candidates for any—or for anyone else, any other candidates. He said, "I feel that you understand they're responsible for my position—"

* * *

[179] A. [Continuing] I understood that very well. Then he said, "I won't hurt you in any way, but I cannot be campaigning for you. I'm sorry." In the course of the conversation, I remember Mr. Lavallee making a statement —"By the way, [180] we have a politician here—"

Mr. Millimet: To this I object, your Honor.

A. —and I asked who he was.

The Court: Excuse me.

Mr. Millimet: This contradicts Mr. Lavallee. I object to it. Mr. Lavallee is a plaintiff's witness, and I don't think he should be contradicted on a critical issue in the case like this.

Mr. Brown: It is not my understanding of the law, your Honor. It would be improper for me to attempt to force all of the witnesses to agree as to every detail. I am offering Mr. Roy, and Mr. Roy's testimony, so far as I know, stands on its own ground, and his credibility as a party and as a witness, of course, is open. The fact that he and Lavallee may, as to minor details, differ in recalling a

telephone conversation is no more unusual than the fact that Pearson and Scott and Millimet disagree as to details in regard to their [181] telephone conversations.

Mr. Millimet: If the Court please, that's a different proposition entirely. This is not a minor detail. This is a critical issue in the case. Mr. Brown produced Mr. Lavallee. Mr. Lavallee testified unequivocally that it was Mr. Roy who raised the issue of Sullivan, and now he's contradicting his own witness, and I object to it, your Honor.

The Court: On that ground, the witness may answer.

Mr. Millimet: Subject to my exception.

The Court: Exception noted.

Mr. Brown: Now, would you read back Mr. Roy's answer as far as he got so he can pick up the continuity?

[Read as requested]

A. [Continuing] And he named Mr. Frank Sullivan. As a matter of curiosity I did ask him, "How long will he be there?" He named a certain date that I don't remember the date. I wasn't interested.

Q. Was that the total reference to Sullivan that occurred during the conversation? [182] A. We spoke about something else, about his work and different other things, but that was all about Sullivan.

Q. Why did you gentlemen discuss Sullivan at all? A. What's that?

Q. Why did Sullivan's name come up at all? A. I don't know.

* * *

Q. At that time, Mr. Roy, did you have any thoughts of getting into the Senate race? A. No. I don't believe so.

Q. What do you say as to whether Senator Bridges' name was referred to at all in this conversation?

* * *

[195] A. Senator Bridges' name was never mentioned in that conversation.

Q. Mr. Roy, the Pearson article refers to you as a former small-time bootlegger. I want to ask you straight out: Were you ever a bootlegger? A. I never sold one drop of liquor in my life, and I was never associated or interested in any speakeasy.

[196] Q. Did you ever have any dealings as a bootlegger? A. None whatsoever.

Q. And you will stake your reputation that is the truth? A. Absolutely.

Q. All right. You were here when Joe Scott told this jury that on three occasions—one time when you came into his office to make a $100-contribution in 1948; another time at a funeral in 1943; and another time he said it was discussed—you didn't tell him—at the George Norman wake. On the first two occasions he said you told him you had been a bootlegger. Did you tell him that? A. I never had any conversation with Mr. Scott regarding the liquor business, and I have never spoken to him about that subject.

Q. All right. So far as you know, during your political campaigns over the years, so far as has come to your personal attention, prior to this 1960 article by Pearson, were your opponents saying that you were a bootlegger—so far as you know? A. Never.

Q. It never came to your attention if it was so; is that right? A. Never. Never heard it.

Q. Did you have any interest, financial or otherwise, in this [187] Marion Street joint at 17 or 19 Marion Street where Shorty Glaude worked? A. Never had any interest in it. I've never been there in my life.

Q. What about this old gentleman, Mr. Bourque, who came in here? Mr. Scott said that you were supplying booze to him. Did you ever have any dealings with Mr. Bourque? A. None whatsoever.

Q. Incidentally, in connection with your appointment as United States Marshal, if you know, was there an F.B.I.

check before you were given that position? A. Any federal appointee has to be—

* * *

[188] Q. ... Your personal knowledge, Mr. Roy. Was there an F.B.I. check made on you before you received this appointment? You can answer that yes or no. Was there or [189] wasn't there? A. Yes. But I would like to say more about that if I am permitted.

* * *

Q. Oh, before I forget it, when you were the candidate of your party for Congress in 1958, did Mr. Millimet write your speeches for you? A. He did not.

[190] Q. Explain to the jury the extent to which you had Mr. Millimet as a speech-writer. A. I was called to Mr. Devine's office one afternoon. Mr. Millimet wanted to discuss what we had to say at that rally that was going on to take place at the Sweeney Post. He handed me a speech. He said, "Why don't you read that?" I read the speech and I didn't like it. I had my own speech. Then he gave me a sheet, typewritten sheet, pertaining to Chester Merrow, criticizing him on his stand on foreign aid, stating that he was touring the country neglecting his duties in Washington. There was some merit in that clause, I mean in that sheet that he gave me, and I agreed to include that in my speech. That's the end of the speech-making that he did for me.

Q. That's the only occasion that he was a ghost writer? A. The only occasion where he wrote something for me. He didn't write it. He had his girl typewrite my own speech, and he included that page there criticizing Merrow.

Q. Did you, after this Pearson column came out, after it was published, Mr. Roy, did you issue any public statement on your own behalf before the primary about this bootlegger business? Did you issue any public statement? A. Didn't have time.

[191] Q. Why not? A. I only found out after the primary was over.

Q. You didn't see the article until after the primary? A. I met a fellow on Elm Street here who lives in Pembroke, and he said to me, "It's too bad you lost, Roy," he said, "I didn't like that article that appeared in the Monitor." I said, "What article—"

Mr. Millimet: I object to this, your Honor.

A. I said, "What article was that?" He said, "The article that called you a bootlegger."

Mr. Millimet: What was the question?

[Question read]

Mr. Millimet: I don't think it's a responsive answer, your Honor; but in any event, we object to it.

Mr. Brown: Your Honor, the hearsay in this instance is admissible since it is a discussion of the article provoked by the article and therefore is admissible on the issue of damages. I think it's also admissible as explaining the circumstances by which the witness first was made aware of the source of the [192] defamation after the political damage had already been accomplished.

Mr. Millimet: For a limited purpose it may be admissible, your Honor, but it is not responsive.

The Court: Very well.

Q. [By Mr. Brown] Did the man from Pembroke have the paper with him? A. I asked him, "What article was that?" and he said he referred to Drew Pearson's article. I said, "I haven't seen that. I'd like to see it." He says, "I've got a newspaper in the car here." He showed me the newspaper. That's where I saw it, read it.

* * *

Q. You say that a fellow from Pembroke brought it to your [193] attention that the article had appeared? A. That's right.

Q. Did any other person besides this fellow say any-

thing directly to you about it? A. Many people called it to my attention after.

Q. You ran for public office after the 1960 campaign? A. 1963.

Q. And in what campaign was that? A. Mayor, Manchester.

* * *

Q. ... In the course of that campaign, Mr. Roy, what do you say as to whether this article was still being discussed? Was it or wasn't it? A. They started a whispering campaign, the opposition, quoting what the Concord Monitor said about me. I heard it in many places in the city.

* * *

[197] Q. As indicated on Plaintiff's Exhibit 27-A for identification, how many votes did you receive in that election? A. 879.

Q. And you were one of the losers? A. That's right.

* * *

Q. In the Congressional election of 1958, Mr. Roy, where you were running against Merrow, how many votes did you get in Manchester? A. 18,000—

* * *

[199] Q. ... In that 1958 contest in the general election, how many votes did you get in Manchester? A. 18,583 votes.

* * *

[202] [By Mr. Brown] What do you say, Mr. Roy, as to whether or not this publication had any effect at all upon your real estate business? Did it or didn't it? A. Of course, I retired shortly after that, and I know that it did me some damage with the public.

Q. How? A. Because many people called it to my attention. I felt that I lost the confidence of many people.

Q. And what effect did that have on the last part of your real estate business? A. Well, many people were under

the impression that once upon a time I was an outlaw.

Mr. Millimet: Well, I object to that and move the answer be stricken.

The Court: It may be stricken.

Q. [By Mr. Brown] Why do you say that this had any effect upon your business? What is the basis for your holding that belief? A. It surely don't do any good for something of that nature to be published when a man is in business.

Q. Why not? A. And I knew that the people were cold to me, and it wasn't the same.

* * *

[209] Q. [By Mr. Brown] Now, Mr. Roy, I want to ask you just a couple of questions about this insinuation in the column that you induced Sullivan to come into this 1960 race as a straw.

Now, would you explain to the Court and jury your view as to whether Sullivan's entry into this race would have been beneficial or harmful to you in the contest of that election? What was the situation as you understood it? A. Mr. Sullivan's candidacy was detrimental to my interest politically.

Q. Why? A. Because he used to draw a very good vote in Manchester. If I was the only candidate in Manchester, I stood a very good chance of being nominated.

Q. Your only opponent was from Hanover? A. Because I had an opponent from the north country.

Q. Now, at the time this article was published, when you were a candidate for the United States Senate, were you physically capable of discharging the duties of that office had you been elected? A. Yes, sir.

Q. This was six years ago. Had there been any change in your general health in the intervening six years? [210] A. Yes.

* * *

[218] Q. All right. Now, I want you to tell the jury how you felt, how Alphonse Roy felt when this charge was made that Alphonse Roy was a bootlegger. What did it do to you so far as your mind was concerned? You tell them how you felt, how you reacted.

Mr. Millimet: I object if this is being offered for lay testimony that any feeling he had in his mind affected any of these organic diseases referred to. He's now testified no doctor advised him, and I object to him trying to prove it, if that is what he thinks he's going to do, through his own testimony.

Mr. Brown: I desire to proceed, your Honor. I asked those questions for the purpose of attempting to make it clear that we're not making that claim but that Mr. Millimet is suggesting we are, to disassociate the two.

The Court: As it may relate to mental anguish, you may proceed.

[219] Mr. Millimet: For that I have no objection, your Honor.

Q. [By Mr. Brown] What was your reaction to the article? What did it mean to you? What was your reaction? A. I was ashamed of myself. I hated to face people, having in mind that people knew that once upon a time I was a bootlegger, they had been informed by the press; and I felt that this article, by this article they had succeeded to poison the minds of thousands of people, and I was really run down and I was hurt, and I felt that way for a long time.

* * *

[220] Q. Well, Mr. Roy, my associates, who are keeping track of what I am forgetting—was there any discussion between you and Joe Scott at the Manseau funeral? A. There was absolutely no discussion whatever at any time with Mr. Scott regarding the liquor business.

* * *

[221] Q. Mr. Roy, do you recall getting out of your car

and going over to get this—to get in Joe Scott's car to talk with him while you were waiting for people at the Manseau funeral? A. The best of my knowledge, I don't remember that.

Q. You remember no such occurrence? A. Absolutely not.

* * *

[225] Q. ... On that occasion, was there any discussion between you and Scott as to whether you had been a bootlegger? A. Never had any such discussion with him at any time.

Q. All right. You've already said you don't recall you even sat in his car at the Manseau funeral? A. I don't recall that.

Q. Do you recall his father-in-law having ribbed you at George Norman's wake with Joe's father-in-law claiming you were a [226] bootlegger? A. I have never been in such a meeting with him. I never had any discussion with Mr. Scott in any meeting, family or otherwise, regarding the liquor business.

* * *

[228] Q. [By Mr. Brown] This newspaper clipping was when, how long ago? A. That's when I aspired for Mayor in 1954, I believe.

Q. '54? And are you the fellow with the black hair in that? A. That's right.

Q. The black hair and the smile? A. That's right.

Mr. Brown: I offer this photograph in evidence.

[Shown to counsel]

* * *

[229] The Court: 31 for identification.

[So marked]

Q. [By Mr. Brown] Mr. Roy, your wife kept a scrap book concerning your activities, did she? A. Some of it, yes.

Q. And is this a sheet out of her scrap book? A. That's right.

[230] Q. And was this a published piece concerning you as of the date that's indicated on the sheet? A. That's right.

Q. And some newspaper clipping that she had pasted on the other side? A. That's right.

Mr. Brown: I offer the scrap book page, and I'm offering it for the side which carries the date August 21, 1935.

[Shown to counsel]

Mr. Millimet: It's a long article, your Honor. It will take a moment for me to look at it.

Mr. Brown: I told the Court I was offering it for the article on the other side.

Mr. Millimet: Oh, you're just offering this cartoon. Well, I think it's remote, your Honor, and I don't see what purpose it has, but other than that I have no objection to it. I assume it's what purports to be, a clipping from something, although it doesn't say what, as of August, 1935. I think it's remote.

The Court: Since there's no objection, it may be—

[231] Mr. Millimet: I object to it as being remote. I don't object to the proof of, you know, what it comes from. I don't know what it comes from. I think we're entitled to know what it comes from. If it's from the Union Leader, I think we're entitled to know that.

Mr. Brown: I don't know whether that was the name of the paper in 1935, but I recognize it as being from that same newspaper, whatever they called it in 1935. We're offering it, your Honor, in regard to this overall question as to whether this man was a bootlegger or whether he was something else.

Mr. Millimet: I don't think it has any tendency to establish that one way or the other.

Mr. Brown: I think it has some probative value as

against the evidence from a hostile, adverse witness that it was generally known and that Mr. Roy's reputation of being a bootlegger was already in the minds of the general public. That's the [232] reason I offer it.

Mr. Millimet: I don't see how it can possibly have that effect. It's already been testified to by witnesses for the plaintiff who could hardly be characterized as hostile that there were many people, and there are today people in Manchester, in the City of Manchester, who were perfectly respectable who were bootleggers. It's never been our contention a person couldn't be respectable because he was a bootlegger at one time.

The Court: Plaintiff's Exhibit 32.

* * *

[1] *Cross Examination*

[By Mr. Millimet]

XQ. Mr. Roy, without going back into the entire history of your career, it's fair to say, isn't it, sir, that you have been a politician for a long period of time? A. That's right.

XQ. And you have been active in politics, as of 1960 you had been active in politics for at least, according to your testimony, 36 years? A. Right.

XQ. And isn't it fair to say that in your many political ventures you learned to take care of yourself pretty well as a politician? Didn't you? [3] A. What do you mean by that, Mr. Millimet?

XQ. Well, I mean you were recognized as an able and astute politician, isn't that so? A. I don't know what you mean.

XQ. Well, I mean you were a good, smart, capable politician; isn't that true? A. I don't profess to be smart. I did my best.

XQ. Well, do you want to say that you weren't a cap-

able politician? You don't want to say that, do you? A. I'm not here to brag about myself.

XQ. No. I understand that, Mr. Roy, and I'm not suggesting you are. I'm trying to direct your attention to your political experience. There isn't any question but what it's extensive as of 1960, is there? A. I've had some experience in politics.

XQ. And you have been a political figure for many, many years; isn't that true? A. That's right.

XQ. And as such, I think, as you've testified before, you developed a following of your own, didn't you? A. Repeat that, please.

XQ. Yes. I say as a political figure of many years experience, you developed a following of your own? [4] A. Yes, I did.

XQ. And that was the situation in 1960, as well as in 1958 and '56? That was true, wasn't it? A. That's right.

* * *

[8] XQ. And isn't it true that you, in your knowledge of politics, were fully aware of the use of straw candidates? A. I heard a lot about straw candidates during all my career.

XQ. You knew quite a bit about straw candidates? A. No more than any other candidate.

XQ. Weren't you one who had practiced the filing of straw candidates prior to 1960? A. Absolutely not.

* * *

[15] XQ. Did you ever suggest to anyone the filing of straw candidates in the Democratic primary? A. I did not.

XQ. Did you ever offer to procure straw candidates for anyone [16] in the Democratic primary? A. I did not.

XQ. Did you ever suggest that for money, candidates

could be procured in the Democratic primary? A. I did not.

XQ. In 1956, Mr. Roy, you ran for Register of Deeds, did you not? A. That's right.

* * *

[20] XQ. Now, Mr. Roy, did you ever suggest to anyone that in running for the Register of Deeds in 1956 it would be a good political tactic to file straw candidates? A. Never did.

[21] XQ. Never. All right. Did you ever suggest to anyone that in running for the Register of Deeds in 1956 it would be a good political tactic to file a straw candidate by the name of "Corriveau"? A. I never did that.

XQ. And so if anybody had anything to do with that, you don't know anything about it? A. Don't know the first thing about it.

* * *

[22] XQ. . . . Now, Mr. Roy, isn't it fair to say that in a race such as the 1958 Democratic primary, where you were a candidate and a man named Matthew Cullen was a candidate, if in addition to you and Matthew Cullen there were two other gentlemen who filed by the name of Frank L. Sullivan, who is a friend of yours, and William C. Ryan, who is also a friend of yours, the tendency would be for Mr. Sullivan and Mr. Ryan to draw votes away from Mr. Cullen, wouldn't it? A. The tendency would be for Mr. Sullivan to draw votes from me.

XQ. You think so? That's your opinion? A. Because he's a Manchester man.

XQ. You heard Mr. Ryan say that the tendency would be for the Irish name to draw from the Irish name, didn't you? A. Well, that can happen, but in that particular campaign I felt that Mr. Sullivan was drawing votes away from me.

XQ. You do? And do you think he was a straw against you? [23] A. I don't believe it.

XQ. You think that Mr. Ryan was drawing votes away from you too? A. I am not sure about Ryan because he had never aspired for office before, but I knew that Mr. Sullivan had run for Congress, was nominated once.

XQ. You knew that Mr. Sullivan, you knew that the name "Sullivan" was a magic name in the Democratic primary, didn't you? A. Yes. And in view of the fact that he had a tremendous vote in the past and was nominated, I was fearful that he would hurt me in Manchester.

XQ. And yet you didn't protest it in any way, did you, in 1960? A. What's that?

XQ. You didn't protest anything Mr. Sullivan did in 1960? A. I never protested any candidate. I always had in mind that any registered voter had a right to run for office.

* * *

[29] XQ. That's right. You say they're supposed to be neutral. They endorsed Mr. Hill, and you came right back and put it on the front page of the paper the next day and said they were arrogant? A. Well, I suppose they were. They're supposed to be neutral.

XQ. Maybe they were, Mr. Roy. I'm bringing to your attention the fact that this had all been in the paper long before we heard of Mr. Pearson's article, hadn't it, this business about calling names back and forth between you and the committee? A. That's right.

XQ. All right. Now, among other things, all I'm trying to bring to your attention is this: that when the State Democratic Committee endorsed Mr. Hill and criticized the other four candidates as unqualified — you see that there? A. That's right.

XQ. — and undeserving of the support of the Democratic Party — you see that's what it says? A. Yes.

XQ. When that was said, one of the committeemen also said, "These straws have been repeatedly run only to elect Republicans." That's what it said, didn't it? A. Yes. But I had no way of knowing that.

[30] XQ. I'm not saying you had any way of knowing it, but if straws were being run in the Democratic primaries for United States Senate, what Republican could possibly be referred to, Mr. Roy? A. I don't know what you mean.

XQ. Well, who would the Republican candidate to the United States Senate who might benefit by the — A. Styles Bridges.

XQ. He's the only one anybody could possibly refer to? He was a master politician and everybody knew he was the one who would be the Republican nominee? A. That's right.

XQ. So this business about helping Republicans was in the paper as early as August 1 or 2 — which date is it? — August 1, 1960; isn't that right, sir — about helping the Republicans? A. If it's in the press, that's it.

XQ. All right. And you read it and you replied in your statement which by good fortune got published on the front page of the Union Leader, which is your home town paper; isn't that right? A. Yes.

XQ. And that's where your following is, primarily, in Manchester; isn't that right, sir? [31] A. Right.

* * *

[32] XQ. You did what any experienced political figure would do. You immediately came back and attacked those who were attacking you; isn't that right? A. I felt that the State Committee was going too far.

XQ. Right. And you said so? A. Yes.

XQ. In fact, you said that "It is this type of action and this type of thinking by a small group of self-appointed leaders which is most dangerous to our party and our

American way of life." You were saying that what these fellows are doing is dangerous to the American way of life. That's a pretty strong statement, isn't it? A. When they attempt to control a party, I feel they're going too far.

XQ. I know you do, Mr. Roy, and I'm not complaining. A. The language I used is right here.

XQ. Right. A. And you take it for what it's worth.

* * *

[42] The Court: Defendants' "E".

[So marked]

XQ. [By Mr. Millimet] Now, it says right on the first page, "At yesterday's session Roy, one of the five candidates for [43] the Democratic nomination for United States Senate seemed to be the target of charges leveled by counsel for Professor Herbert W. Hill, of Hanover, even though Hill does not claim Roy is a straw." Isn't that right? A. Yes.

XQ. In other words, that was the way Mr. O'Neil interpreted the petition, isn't that right? A. Yes. But you're the fellow that was making the charge.

XQ. I was the attorney for Mr. Hill. A. You were wrong, too.

* * *

[44] XQ. And it was widely circulated in Manchester, this interpretation that you were somehow being charged as being responsible for these straws; isn't that so? A. That's right.

XQ. Much more widely circulated than anything Drew Pearson wrote a month later; isn't that so? A. I don't know how I can answer that. There is nothing malicious in this article here, whereas the other article was unprovoked and malicious.

Mr. Millimet: I ask that the witness's characterization

be stricken. I'm only asking if it wasn't more widely circulated.

Mr. Brown: I think the witness's answer is appropriate, and I think it should stand, your Honor.

[45] The Court: It may be stricken. You'll disregard it, Mr. Foreman and members of the jury. Exception noted.

* * *

[47] XQ. Then when the Ballot Law Commission decided to rule two of these gentlemen off the ballot, it was again widely publicized in the paper, wasn't it? Here we have the paper for Friday, August 5, and the big headline right across the top of the page is "Straw Candidates. Two Ruled Off The Ballot". Is that right? A. That's right.

* * *

[48] XQ. Now, Mr. Roy, you, yourself, understood that this Ballot Law proceedings implied that you had something to do with filing these straw candidates, didn't you, and you said so? A. The Ballot Law Commission had no way of knowing until you [49] brought it up.

XQ. I understand that. Don't you think that it's proper, if you believe that there are straw candidates in a primary, to bring it to the Ballot Law Commission? A. You knew I wasn't challenged. Why did you insist that I would appear before the Ballot Law Commission?

XQ. Mr. Roy, I'm just asking you a simple question. Don't you believe that it's proper to bring before the Ballot Law Commission evidence of persons who are filing as straws for major office in the Democratic primary? A. Not proper to accuse anybody who is not responsible for it.

XQ. I understand you're saying that, and I didn't accuse you at the Ballot Law Commission. A. Why did you ask me to go there?

XQ. I asked you to come to testify, didn't I? A. And implying that I had something to do with it.

XQ. It was Mr. Wyman who asked you if you raised any money for these people, wasn't it? A. The Secretary of State informed me that you made the request.

XQ. No, Mr. Roy — A. The Secretary of State told me that I had no business there.

XQ. Mr. Roy, the question that I asked you is simply this: All that you and I discussed was the question of straw [50] candidates in general and the question of nationalities in the primary; isn't that so? It was Mr. Wyman who asked you whether you had anything to do with securing money for these people, wasn't it? A. That's right.

XQ. It was the Commission. Now, Mr. Roy, you, yourself, interpreted this whole proceeding as implying that you, or someone interested in your candidacy, placed the straws in the Democratic primary, didn't you? And you said so publicly, didn't you? A. Will you state that question again?

XQ. All right. I'll restate it, reword it. After the decision, after the decision of the Ballot Law Commission, you issued another public statement, didn't you? A. Have you got that statement?

XQ. Yes. I think it's in evidence. A. No, I guess it isn't.

[Witness shown paper]

A. That's exactly what I read awhile ago.

XQ. No, no. This is another one. This one is August 8. The Ballot Law Commission hearings were over on the 4th, Mr. Roy, and they made the report and it was printed on the 5th. I think you will find this is the following Monday. [51] I think the 5th was a Friday. This was the following Monday. You had another statement in the press, didn't you? A. What is it all about?

XQ. Well, you charged the Hill people with smearing you, didn't you? A. That is right.

XQ. You made another big statement? A. Yes.

XQ. You defended yourself in the press? A. Yes. The State Committee, Hill — including you — were smearing me, trying to implicate me with this deal.

XQ. And you said so, didn't you? A. That's right.

XQ. And you got your statement published in the press? A. That is right.

XQ. And you implied in that statement that it was Hill and Hill's supporters who filed those straws, didn't you? A. I didn't know who filed those straws.

XQ. I asked you, didn't you imply that this was Hill's doing instead of yours? A. No more than you imply that I was responsible for it.

XQ. I understand that. This was give and take in a political contest, wasn't it, Mr. Roy? That's what it was. That's [52] fair to say, isn't it? You were on one side of the fence and the State Committee and Hill, including myself, were on the other side? A. That's right.

XQ. And we were fighting over a political question, weren't we? A. That's right.

XQ. And you recognize that in politics things get pretty tough sometimes with a lot of pulling and hauling; isn't that right? A. That's right.

XQ. We made our statement and you made yours, isn't that right? A. That's right.

XQ. And the upshot of the whole thing was each one was accusing the other one of filing the straws, isn't that right? A. What's that?

XQ. The upshot of the whole thing is that in the press, at least, not what actually happened but in the press, it appears as though each one is accusing the other one?

Mr. Brown: Well, are you going to introduce Mr. Roy's subsequent statement that you referred to that you are

now interpreting? Are you going to introduce it as an exhibit?

[53] Mr. Millimet: Yes. As soon as the witness is through with it.

Mr. Brown: All right. Then I have no objection.

XQ. That is right, Mr. Roy? A. That's right.

Mr. Millimet: All right. I offer the statement, your Honor.

The Court: Defendants' "G".

[So marked]

XQ. [By Mr. Millimet] What's more, Mr. Roy, you not only had your own statement in the press but you got some pretty good support from the Union Leader in attacking the State Committee, didn't you? You remember that? A. Don't remember that.

XQ. I'll show it to you. I want to show you the Union Leader for —

Mr. Brown: I think I want to see it before it's discussed before the jury. You surprise me. You surprise me, Mr. Millimet, that you're bringing in the editorials from the Union Leader. The first time you've surprised me during the case.

Mr. Millimet: If you want to read it, go ahead.

[54] Mr. Brown: I can't very well read it while the witness is reading it.

Mr. Millimet: All right.

[Witness read document]

Mr. Millimet: Do you want to read it, Mr. Brown?

Mr. Brown: If you're going to be quoting from it, yes. If you're not, I'm not so concerned.

[Submitted to counsel]

Mr. Brown: Mr. Millimet, I have no objection to the editorial which you apparently have reference to. I do think it would be best not to introduce the entire page because there are other items on here that have nothing at all

to do with what we're concerned with but which should not, as far as I'm concerned, get into the record. At the same time, the Republicans were being castigated in that paper on a different matter entirely, so if you want to cut out the portion you're referring to and put it in as an exhibit, I have no [55] objection.

Mr. Millimet: Well, the column discusses the Republicans too, your Honor. This is a political campaign.

Mr. Brown: I object, your Honor, because of irrelevant and possibly prejudicial material completely unrelated to this case on the same page. I have no objection at all to what my brother apparently is offering it for.

Mr. Millimet: Well, I didn't even see this, your Honor, but I don't think it has any prejudicial matter, as far as I can see.

[Shown to the Court]

Mr. Brown: No necessity of having a ful. page of Mr. Loeb's editorial opinion when there is only about six inches of type relating to this case.

Mr. Millimet: Let's have it marked for identification so we won't waste time, may we, your Honor? We'll decide that later.

The Court: Defendants' "H" for identification.

[So marked]

[56] XQ. [By Mr. Millimet] Now, Mr. Roy, I just want to show you your statement. Did you write all these statements yourself or did you have help with them? A. Myself.

XQ. You did it all by yourself. You didn't consult with anybody about it? A. No.

XQ. Okay. You were defending yourself? A. That's right.

XQ. And in this statement that was published, that was released by you and published on August 8, you said: "Apparently it was not foreseen that Mr. Hill's action

could have attained this result. If these candidates were straws and the Ballot Law Commission was right in its decision, it raises a strong suspicion that the filing of these candidates, whether known or unbeknown to Mr. Hill, and the filing of the protests against their candidacy is a new refinement of an old political practice by certain unidentifiable individuals favorable to Mr. Hill's candidacy who wish to weaken my chances of election and at the same time smear me with the insinuation that I was the one who filed them." That's what you said, isn't it? A. That's right.

[57] XQ. "The action taken by Mr. Hill naming the other three candidates as straws hurtful to him immediately implies that I, or someone interested in my candidacy, placed them there." Isn't that right? A. Right.

XQ. That's what you said? A. It's in print. That's what it is.

XQ. You were saying they were accusing you but you were accusing them? A. That's right.

XQ. And you went on to say that these insinuations were untrue, didn't you? You denied them? A. That's right.

XQ. And you denounced the people who had done it? A. That's right.

XQ. Then the paper sided with you, didn't it? You got support from the paper? A. I suppose so.

XQ. Well, here it is: "Alphonse Roy of Manchester, candidate for the Democratic nomination to United States Senate, has learned the hard way that the Democratic State Committee is nothing more than the tool of Bernie Boutin and company." [58] Isn't that right? A. Yes.

XQ. And the editorial is called "The Boutieratic Party"? A. Yes.

XQ. And they say, "One is inclined to wonder whether the Democratic leadership is completely drunk with power." Isn't that right? A. Yes.

XQ. And it describes your statement — "Roy described the action of the autocratic Bouticrats as 'one of the most arrogant, unfair and unjust moves ever made by any state committee.' " Isn't that right? A. That's right.

XQ. You knew what to do and you did it, didn't you, sir? You were an experienced politician and you had support? A. I knew the State Committee were unfair and I expressed my views.

XQ. And you felt the Ballot Law Commission proceedings were unfair and you expressed your views? A. I'm not criticizing the Ballot Law Commission.

XQ. Well, what did you mean when you said "If it was right —" What did that mean?

[59] Mr. Brown: Why don't you read the entire statement, Mr. Millimet, and let the jury understand what you're saying instead of picking it apart as you're doing?

XQ. [By Mr. Millimet] What does this mean to you, Mr. Roy: "If these candidates were straws and the Ballot Law Commission was right in its decision —" What did you mean when you said "if it was right in its decision"? A. Well, if they were straws, the Ballot Law Commission had a perfect right to take them off the ballot.

XQ. Is that what you meant? A. That's what I meant.

XQ. And you understood that in order for them to be removed from the ballot, the Ballot Law Commission were saying that they were filed for the purpose of drawing votes from another candidate; isn't that right? A. That's right.

XQ. And wasn't it widely discussed at the time, Mr. Roy, that the candidate from whom they were drawing votes was Mr. Hill rather than from you? A. It was discussed some, yes.

XQ. And wasn't it discussed among Democrats that, as it said in [60] the first story that was ever published, that

this was for the benefit of the Republicans? Wasn't that said? A. What's that? Will you kindly repeat?

[Question read]

A. There was different views, naturally.

XQ. Right, but that was one of the things that was discussed, that this straw business benefited the Republicans? A. That's right.

XQ. And if any Republican benefited in the Senate race, it had to be Styles Bridges, isn't that right? A. Right.

XQ. Now, you're complaining here in this case, aren't you, Mr. Roy, because you say that the implication of Mr. Pearson's column is that you had something to do with the straws to the benefit of Styles Bridges? Isn't that what you're complaining about, among other things? A. That's right.

XQ. Isn't that the same implication that had been in the paper and in the discussion a month before this column was ever published? A. Far from being the same.

XQ. What was — it was the same campaign, wasn't it? A. What took place at conversations with Mr. Lavallee is far [61] from being the same.

XQ. Oh. All right. All right. What you're saying is that there was nothing in the Ballot Law proceedings about Mr. Lavallee? A. That's right.

XQ. But you admit that you talked with Mr. Lavallee before that, don't you? A. I testified this morning that I called him.

XQ. Right. And you admit that among other things, you did talk with Mr. Lavallee about the time when Mr. Sullivan was going to be released, didn't you? A. Only asked — after Mr. Lavallee told me he was there.

XQ. I understand that. A. I had no way of knowing that he was confined in that institution.

XQ. I heard Mr. Lavallee say that you were the one who

raised Mr. Sullivan's name, didn't you? A. I heard that.

XQ. You think he's wrong? A. He's wrong.

• • •

[103] XQ. That was because times were hard? A. That's right.

XQ. What kind of funds, what kind of wages did they pay in the mills back in the early '20's? A. Well, probably worked two or three days a week.

XQ. How much money would you make? A. If I remember the wages, it was $17.05 for two weeks, if you worked steady.

XQ. Pretty low wages? A. What's that?

XQ. I say the wages were pretty low in those days — I'm talking about the early '20's? A. Yes.

XQ. And when was it that you started to work with Mr. Beauclair to supplement your income? A. About in the '20's. Probably '26 or around there.

XQ. Now, you also said yesterday that you never heard any of your opponents in these various elections that you were taking part in between 1924 and 1934, you never heard any of them refer to the fact that they thought you had been a bootlegger; isn't that so? A. I never heard it in those days, no.

XQ. Well, the way you gave your answer, Mr. Roy, I think is that [104] you said you never heard any of your opponents in the election say it. I just want to ask you this: Did you ever hear the stories come back to you that other people said you had been a bootlegger? A. It was never mentioned. Never came to my attention.

XQ. In any event, if there were any such stories that were repeated between 1924 and 1934, it didn't have any effect upon your political career, did it? A. I never knew about it.

XQ. Well, you won all those elections that you were in back in those days? A. Yes.

XQ. Now, I want to refer to this incident that Lieutenant Suosso testified about, Mr. Roy. As I understand it, you're not a drinking man? You never have been? A. That's right.

XQ. So it's fair to say that on the day — what was it, January 8, 1923? — when you were in your brother's — brother Manuel's place, you weren't there for the purpose of drinking? A. No, sir.

XQ. By the way, you knew, and it was well known, that both of your brothers, Manuel and Emile, had been engaged in the [105] liquor business? A. My brothers?

XQ. Yes. A. That's right.

XQ. Manuel here in Manchester and Emile here in Manchester also? A. No. In Franklin.

XQ. Oh, Emile in Franklin. And is it fair to say that on that day you were in Manuel's place — there is no question about that, is there? A. I would like to explain what happened there if I'm permitted to do so.

XQ. Well, I'll give you a chance to do so in due course, Mr. Roy. I think I'd just like to ask you — you were there that day? A. I was on my way out when the officers came in.

XQ. You were on your way out? A. That's right.

XQ. And you stopped to knock a glass of liquor out of Officer Chapman's hand? A. I don't recall that. I was on my way out with a friend of mine when they came in, and I remember one officer saying "Stay where you are." The fellow in front of me — a man by the name of Morgan— was going out, and I followed him.

[106] XQ. Excuse me — a man by the name of what? A. Morgan, James Morgan. I followed him. We went out. I realized that the officers wanted everybody to stay in, and I was outside when they searched the place. It is

very possible that either my friend or myself may have touched that officer or bumped him as we were going out. I stayed outside after the search was over. They came out with my brother and the other fellow that was arrested, and I was asked by Officer Guiney, Walter Guiney, to go to the station because Lieutenant Gorey wanted to see me, so I went across with these other people. And I sat in the office there, and Mr. Guiney says, "You wait in the office here." I waited there, and after awhile Mr. Gorey came along. He said, "Now," he says, "we just booked your brother for selling liquor" — or illegal possession; I've forgotten what he said now — "What I wanted to see you about, I would like to have you talk with him, try to make him understand that he should give up that business." I told him that I had spoken to him before, that I was always against that business. I went further than that. I went to Police Commissioner Dr. Biron, at that time I believe who was a police commissioner, and he was quite friendly with my brother. My brother used to do some work for him around [107] his home, used to go to the beach with him; and I asked Dr. Biron if he would be good enough to speak to him, trying to discourage him and get him out of that business —

Mr. Millimet: Well, if the Court please —

A. — and he did.

Mr. Millimet: I think I have permitted the witness to go on long enough. I don't think it's responsive, and I ask that he be instructed to wait until I ask him another question.

The Court: You have explained your answer, sir?

The Witness: Your Honor, I'd like to say something else, if you please. I would like to state that I was never under the impression that I was arrested. I was asked to go to the station.

XQ. [By Mr. Millimet] I see. And that's all, you just

went and sat in the office? A. And after I was all done with Mr. Gorey, he told me to go home and try and convince this fellow that he should give up that business.

XQ. And that's all that happened? A. That's all that happened.

[108] XQ. And do I understand that you were saying that you didn't, as Officer Chapman's diary says, you did not come from behind and knock the glass out of his hand? A. I have no desire to contradict the report of some of these officers, but I never knew that I was under the arrest until the report was released recently.

XQ. Well, you remember when I took your deposition I asked you not only if you had ever been arrested but I asked you if you had ever been in your brother's place when liquor was served there and you denied it? A. While I was there, there was no liquor being served.

XQ. Well, you just told us a minute ago, Mr. Roy, about how you were there when the officers were there? A. They came in to raid the place. I didn't know there was any liquor in there.

XQ. Weren't you there when the liquor was served to Mr. Chapman? A. I wasn't there. I didn't see it. There was a lot of people in that place. I haven't seen any liquor. I went there occasionally and no liquor was sold in my presence. He knew I was against it.

XQ. Well, you knew that he was selling liquor there? A. I had heard it many times. People used to come to me and tell me they had bought some liquor from him, and I used [109] to criticize him.

XQ. You want to say that after all these years that your memory of this incident is better than the police records? A. Well, I don't want to contradict or dispute the report, but I'm here to tell what I know, what I remember.

XQ. If you were arrested, don't you think you'd re-

member it? A. I would go before court. I would pay a fine.

XQ. Well, if you were put in jail, you'd remember it? A. I must have been arrested for something. Interfering with an officer is something that —

XQ. Mr. Roy, you have searched your memory about this thing, haven't you? A. Absolutely.

XQ. And you're giving us all these details now. Is this all that happened? Are you telling us the whole story? A. Absolutely what happened.

XQ. You just were invited there and treated as a spectator; is that what you're saying? A. It was a public place. There was many people in that place and I was there with a friend of mine.

XQ. When you say it was a public place, what are you referring to, Manuel's Near Beer Saloon? A. Well, anybody could go in there. They started to sell [110] light lunches and drinks and all that. It was a public place.

* * *

[111] XQ. Now, if this incident, or any of your other activities, resulted in stories about your being a bootlegger, you say you didn't know about it, is that right? You didn't know anything about it? A. If they were circulating that I was a bootlegger?

XQ. Yes. You never heard it? A. It never came to my attention.

* * *

[144] *Redirect Examination*

Q. Mr. Roy, you told the jury that as a result of Captain Guiney asking you to the station to talk with Inspector Gorey that you tried to get Dr. Biron to speak to Manuel to try to get him out of the liquor business? A. That's right.

Q. Did he get out of it? A. Yes.

Q. What did he do? A. He went back to the shoe factory where he used to work. Never had any more trouble with him.

* * *

[146] (Deposition read by Mr. Guenther to the jury as follows:)

"Deposition of Albert H. Hoff, taken by agreement of counsel at the request of the plaintiff, 229 West 43rd Street, New York, New York, commencing at 12:00 o'clock noon, April 7, 1961, before a certified shorthand reporter and notary public for the State of New York.

* * *

[147] "ALBERT H. HOFF, called as a witness, having been first duly sworn by a notary public, was examined and testified as follows:

"Q. (By Mr. Greene) What is your name? "A. Albert H. Hoff.

"Q. Where do you live? "A. Demarest, New Jersey.

"Q. You are connected with the Bell Syndicate, Inc.? "A. Yes.

"Q. In what capacity? "A. Let me retract that. I am not connected with Bell Syndicate, Inc. Bell Syndicate, Inc. is a non-operating company.

"Q. For whom do you work? [148] "A. I work for the Bell Syndicate, Division of North American Newspaper Alliance, Inc.

"Q. In what capacity? "A. I am secretary-treasurer of North American Newspaper Alliance.

"Q. For the record, Mr. Hoff, it's been suggested we refer to North American Newspaper Alliance as NANA, is that right? "A. Yes.

"Q. Is that a corporation? "A. Yes.

"Q. Where was it organized? "A. Delaware.

"Q. Are its offices here in New York? "A. The majority of them are. I think they all are now. There was one that was in Washington, D. C., but I received a resignation from him several months ago.

"Mr. Millimet: The question was 'offices', not 'officers'.

"The Witness: I am sorry; would you repeat the question?

"By Mr. Greene:

"Q. Are the offices of the corporation located in New York? [149] "A. Yes. They are in New York.

"Q. Do you have offices in other states? "A. Well, what type of offices are you speaking of?

"Q. Business offices. "A. Well, we have an office in Chicago and in San Francisco, but their only purpose is for relaying our news service. It's a shipping point. They do no business out of the offices at all.

"Q. The business offices are located in New York? "A. That's right.

"Q. What is the relationship between NANA and Bell Syndicate? "A. Bell Syndicate is a division of North — NANA.

"Q. By 'division', is it a separate corporate entity or a trade name? "A. It's a trade name.

"Q. Just a trade name? "A. Bell Syndicate you are speaking of?

"Q. Yes. "A. Yes, it is a trade name.

"Q. When I first inquired, you said that Bell Syndicate, Inc. was a non-operating company. "A. I will elaborate on that. There was, up until June, [150] end of June, 1959, a Bell Syndicate, Inc. which had been organized many years ago. At that time, it was merged with its parent company NANA. From that

point on, it was known as a division of NANA. At the same time we did that, to protect Bell Syndicate's name, which is well known in the field, we organized a new corporation, the Bell Syndicate, Inc., which is in operation.

"Q. Which was formed for the purpose—? "A. Just for the purpose of protecting the name.

"Q. The stock of that Bell Syndicate, Inc., this inoperative company, is owned by NANA? "A. Yes.

"Q. So that it is a wholly owned subsidiary? "A. That's right.

"Q. Is the stock of NANA widely held or is it a closely held corporation? "A. Very closely held.

"Q. What is its business, basically? What does it do? "A. You are speaking of NANA?

"Q. Yes. "A. NANA is a holding operating corporation. It has its own service, a news service, which is sold nationally [151] and all over the world. On its holding operation it also is the holding company for several other corporations.

"Q. Are those several other corporations connected with the newspaper business? "A. Yes. They are all similar. They are newspaper syndicates. Newspapers can't act as a distributor of newspaper features."

Mr. Guenther: At the time of signing, the deponent indicated that that answer did not make sense. If Mr. Millimet has no objection, I will read the correction.

Mr. Millimet: Wait till I find it. What page is that?

Mr. Guenther: Page 6.

Mr. Millimet: All right.

Mr. Guenther: The correction:

"The sentence does not make sense. Newspapers can act as distributors of newspaper features. New York Herald Tribune is a perfect example. They have a

department set up for circulating features and comics published in its own paper."

Mr. Guenther: Next question:

"Q. Will you give me the names of a couple of them? [152] "A. Of what, corporations?

"Q. Yes. "A. Corporations that NANA holds?

"Q. Yes. "A. The Associated Newspaper, Inc.; Consolidated News Features, Inc.; the McClure Newspaper Syndicate. It does not have an 'Inc.' on it, but it is a corporation. Women's News Service, Inc.

"Q. Now, does Consolidated News Features, Inc., as an example, do business separately from NANA? "A. Yes. They are all operated on their own, separate corporations.

"Q. Even though each, in substance, is wholly owned by NANA? "A. That's right.

"Q. Speaking again of Consolidated News Features, Inc., is it a news service? "A. No. The name is misleading.

"Q. What does it do? "A. It owns, as I say—it owned—although I use that term advisedly, it owned a list of its own features. Bell Syndicate may service the Drew Pearson column, Mutt and Jeff column, or any number of features. [153] Consolidated also has its own list of features, separate and distinct from those that Bell owns and the same would apply to Associated Newspapers and the McClure Newspaper Syndicate."

* * *

"Q. Then if you describe the operation of the business of Bell Syndicate, that would describe as well the operation of these other companies that are held by NANA? "A. That's right.

"Q. They are essentially the same in the way they carry on the business? "A. That's right.

"Q. Coming down to Bell Syndicate as a division of NANA, what does it do? "A. Actually, our operation is accounting, as an agent for authors and artists. Our duties would be to try to sell the particular feature for the author, to do the necessary productive activities, have engravings, mats, et cetera, made, which are then sent to newspapers. It [154] is our duty to bill and collect for the use of these features and regularly make a report to the author and paying him his share.

"Q. Coming down to the Drew Pearson column, as an example, since it is his column that is involved in this case, does NANA own the right to distribute that column? "A. Are you speaking of NANA as NANA or NANA as a division of Bell Syndicate?

"Q. I suppose it's the same thing. When you are speaking of NANA, you are speaking of Bell Syndicate. Shall I assume that? "A. Yes.

"Q. The question is, do they distribute it? Do they have the exclusive right to distribute? "A. Yes.

"Q. Generally, is that right based on a contract between NANA and Drew Pearson? "A. Yes.

"Q. Does that contract make you the agent for the purposes of distribution? "A. Yes.

* * *

[155] Mr. Guenther: Statement by Mr. Millimet:

"Mr. Millimet: When you say 'you', whom do you mean?

"Mr. Greene: Bell Syndicate.

"By Mr. Greene:

"Q. I am not concerned about the details but how is the compensation arrived at between Bell Syndicate and Drew Pearson? Is he paying you to get this published? "A. No. The remuneration involved is obtained from sales to newspapers of the feature.

"Q. That's the overall remuneration? "A. That's right.

"Q. As between you and him, is it on a percentage arrangement? "A. That's right. Well, let me elaborate a little bit. It's a guarantee and percentage arrangement.

"Q. You guarantee him a certain amount for the column? "A. Well, we guarantee that he will receive a certain amount of money minimum plus a percentage.

"Q. Of the gross? "A. Well, the percentage applies on amounts over the guarantee.

[156] "Q. Is that handled on an annual basis? "A. Well, you mean the contract with him?

"Q. Yes. "A. Off hand, I believe the last one was a five-year contract, and I am not sure just when the period started.

"Q. Mechanically, how does the material get from him to you to a newspaper? "A. He has a teletype, I believe, in his own office. It is a direct line to the receiver we have in our shop. So we will get the copy of that. We will have it stenciled, mimeographed and then shipped.

"Q. By 'shipped', is that mailed? "A. Yes, mailed. Let me go a little further on that. The New York office will mail out—well, roughly, to the whole East Coast, because it is timely material. As I mentioned before, we do have two shipping points, one in Chicago and one in San Francisco, which are on a direct line also with this office by teletype. The column is also typed to both shipping points and in the shipping points, automatically, a stencil is made by the machine, mimeographed and shipped out to the regional points.

"Q. Do you exercise any control over the content of the [157] column? "A. I would say no on that. If we wanted to do anything with the column, if it came

in, we certainly could not do it without Drew Pearson's okay.

"Q. I take it you have no right to control the content? "A. That's right. It may come up from time to time that we might for one reason or another question the material. Maybe he has got a wrong date in there and we know it's wrong, so we will query him on it. But otherwise, as I said, as I stated earlier, wrong or right, we cannot change it without Mr. Drew Pearson's okay.

"Q. In your agreement with the newspaper that publishes the column, I assume you have contracts with the newspapers who carry Drew Pearson? "A. Not always. I mean originally when the same is made we will—let me put it this way: In most cases we do not have a formal contract. The contract may as such is incorporated in a letter form. In other words, we will acknowledge the sale to the newspaper in giving the rate per week and starting date, and most contracts —these letters—will be on a 30-day notice basis. Possibly they may be for a period of time minimum and [158] then on 30-days or 60-days notice thereafter for concellation.

"Q. Since you have no right to change the content of the column, I assume the newspaper is bound to publish it in the form that it is received? "A. No. We are not interested in whether the paper publishes it or not as long as they pay for it.

"Q. They could withhold publication of the column if they wished? "A. Yes. They could edit if they so wished. They might edit for various reasons. They might edit it because of space, they have not got enough room to put the whole column in. They may delete various portions of it or they may wish to

delete for other reasons. It may be any number of reasons.

"Q. They can leave out the column entirely or edit it as they see fit? "A. That's right.

"Q. How do you carry on your work that you mentioned earlier to accomplish the sale of these various columns to newspapers? "A. Well, we—there are two ways we can do it. We might send a salesman in to the territory or it could be [159] done by mail promotions. Mainly, we use mail promotion."

The Court: We will take the noon recess at this time. We will resume at 2:00 o'clock.

(Luncheon recess at 12:45 p.m.)

AFTER RECESS

Mr. Brown: If it please the Court, I would like to offer the following additional contractual arrangement, evidence of it. I want to offer it in evidence, but at the moment I'd like to offer it for identification only if I may.

The Court: 33 for identification.

(So marked)

* * *

[11] TESTIMONY OF ENOCH SHENTON

Direct Examination: . . .

* * *

[21] Q. Now, can you tell me something about the procedure as far as receiving the column from the syndicate and getting it into print? A. Well, the letter containing the Drew Pearson column daily came to me. I think it came in special delivery, but I'm not sure. It was mimeographed. It was what he had written that day. At the same time there was another mailing that also reached us. I'm sure that

came air mail, special delivery. That contained a perforated tape. This perforated tape came from another source, but it was his column interpreted in holes in a piece of paper, and this tape went directly to the composing room. This tape is like — I like to thing of it as like the old rolls on a player piano with the holes in it. This tape was fed enough one side of a linotype machine, and the linotype machine would do the same thing a player piano did except [22] that it turned out lines of type. The linotype machine would turn out the column in type, ready to be printed in the paper, and when all the type was made from this tape, it would be stored in a rack in the composing room, and it would stay there until I sent the copy out. That is, the column that Drew Pearson had mailed me, mimeographed copy of the column, had to go into the back shop, the composing room, before they could pull that galley of type out of the rack and put it in the paper.

Q. Mr. Shenton, we have marked as an exhibit this column, and it's been testified that this is the way it would be sent up; is that right? A. This is the way I received it. That's the form in which I received it.

Q. Referring to Defendants' Exhibit "B". All right. Then what would you do when you received the column? A. I'd cross — the job would be to circle the top of the column so the composing room would know which one it was. The same words that I had here would already be in type out back, and the man in the composing room who received this copy when I sent it into the composing room, which was right next to my room, would look at this, and he'd go to his racks and he'd pull out a galley of type and look to make [23] sure that this was the same one, and then he'd put it up on the stone for inclusion in that day's paper.

Q. Well, did you read the column? A. Well, that's one thing I wanted to check on. Masses of type have to be

broken up with sub-heads, and those sub-heads somebody has to write in. I just noticed these happen to be all in. I thought I had written these sub-heads myself. I normally did on Lippman's column and Dorothy Thomson's column. I thought I had written in the sub-heads on this column, but apparently they were already in there. But they still had to be marked.

* * *

[24] Q. And it was back in 1960?

* * *

Q. When would your paper come out? You say it's an afternoon paper. Would it come out at noon or 2:00 o'clock — ? A. 2:00 o'clock. Our press time was 1:30, and it would hit the street about 2:00 or 2:30.

Q. And you have, well, subscribers to your paper outside of Concord. How did they get their paper — say someone in Manchester? A. Well, that would go by mail.

Q. I see. So this particular column we're talking about here came out on Saturday afternoon. Would somebody normally get the paper in Manchester if they were mail subscribers? A. The next morning.

Q. Sunday morning? A. No. No, it wouldn't be on Sunday. It would be Monday morning, unless they were post office box holders.

[25] Q. Now, while we're on that, briefly, do you have some idea of the circulation of the paper back at the time this article was published in September, 1960? A. About 12,000 a day.

Q. All right. Now, I show you — would you identify these documents I hand you, sir? A. That's the Audit Bureau circulation for the Concord Monitor, March 31, 1960, for the twelve-months period ending that date.

Q. Well, can you tell us what this audit purports to show? A. Well, it tells what our circulation is in Concord and every community where we sell the paper.

Q. All right. Could you direct your attention to that and tell us what the Manchester circulation was for the Monitor? A. Well, we sent ten papers down to carriers and dealers — that would mean it would be on the news stand or wherever they sold their papers — ten a day, and thirty-seven papers went by mail. They'd have been delivered by mail. For a total of forty-seven paper a day.

Q. And that was — all right. Representing forty-seven papers delivered to greater Manchester? A. That's right.

* * *

[28] Q. Can you tell us what you did about this column in a non-mechanical way? A. The editorial routine, you mean?

Q. With this particular column, Mr. Shenton. A. This column was handled just the way the other columns were handled. They were read generally to make sure they conformed with out style. In other words, what is a capital letter and what isn't? To observe, well, the editorial niceties. In other words, this column had to be exactly the same kind of English that other columns were in. Nothing special was done to it. I would write in sub-heads. In this case these are already in here, I notice.

* * *

Q. And what did you then do after reading it? A. Sent it out to the back shop.

[29] Q. To have it printed? A. Yes.

Q. And it was printed and distributed? A. Yes.

* * *

Q. By the way, did your paper cover the Ballot Law hearings? A. Yes. We had had those stories. It was a series of stories, continuing from the time protests are made until the case is decided.

Q. And you recall the result of those hearings? A. Yes.

[30] Q. That two gentlemen were removed from the ballot? A. Yes.

Q. And that Mr. Sullivan was allowed to remain on the ballot? A. Yes. Those were Page One stories.

* * *

Q. ... Mr. Shenton, this article also made reference to Mr. Roy; is that correct? A. Yes.

Q. And it made reference to Mr. Roy as being a small-time bootlegger; is that correct? A. That's right.

Q. You read that?

Mr. Brown: If it please the Court —

A. Yes, I read that.

* * *

[31] Q. ... Can you tell us, sir, in regard to that statement, what you did any why you did it? A. Well, I read the column. There was little in it that was new to me. I read it. I was interested in it. I was glad to see he was writing something about New Hampshire for a change. And I sent it out to be set in the paper.

Q. Well, did you know Mr. Roy? A. I had known him for many years.

Q. In what connection? A. He was a Governor's Councilor when I first started covering the state house as a reporter.

Q. In the early '30's? A. No. That was in Winer's administration, and 1933 would be my first contact with him, seeing him. I covered the state house a month or so that summer and each succeeding summer while I was still in school, and he was a figure of some consequence in the state house at that time, and it was my [32] business to be able to identify these people, and I secured as much background about them as I could, and he was just one of the five Councilors and the Governor and other personalities in the state house about whom I had made it my business to be informed.

Q. Well, in regard to background and informing, what had you, if anything, heard about Mr. Roy? A. Well, I

recall very early in my newspaper career hearing that he had been a bootlegger. In fact, I think when I was first a state house reporter, he was at that time a bootlegger. That was the impression I got from my contacts in the state house.

Q. You mean from stories around the state house? A. From information that was given to me.

Q. Well, some specific knowledge or general — A. General knowledge. I was too young to drink then.

Q. And this occurred in the course of your duties around the state house? A. Yes.

Q. On more than one occasion? A. Frequently.

Q. And this was before Mr. Roy was elected to Congress? A. He was elected to Congress in 1936. This was before then.

[33] Q. And he later became United States Marshal? A. Yes. That was later still.

Q. So when you saw the story, is this why you printed it? A. No. I saw nothing in the story that was likely to cause any trouble. That was my — would have been my motivation if I had seen anything that was damaging. I would have stopped it.

Q. Did you have any personal ill will toward Mr. Roy? A. No.

Q. Now, the article makes reference to a telephone call, I think, by Mr. Roy to Mr. Lavallee? A. I read that. This was the only thing in the column that was new to me.

Q. Well, did you double-check that? Was this of interest to you? A. It was interesting, yes.

Q. Did you call Mr. Lavallee? A. There was no need to. He obviously had his own contact with Lavallee directly.

Q. You mean "he", meaning Mr. Pearson? A. Pearson.

Q. You saw no need to — A. An editor obviously does not back check on every story his [34] reporters turn in. An editor has to trust his reporters. Otherwise the editor

would have to go out and get the story himself, and then somebody would have to check the editor.

Q. The article goes on to refer to "muddying of Democratic waters". You printed that. You printed the entire column; is that right, sir? A. Yes. I printed the whole column.

Q. And what was that about? A. Well, this was referring to something that had popped up in the Ballot Law Commission that summer, when Herb Hill went to the Ballot Law Commission to have three — I think there were three candidates he tried to have knocked off the ballot because they were straw candidates, and he got two of them off the ballot. One of them, Sullivan, was allowed to stay on the ballot because he'd had a prior history as a Democratic candidate and Democratic nominee for Congress at one time. The ballot Law Commission held him to be a legitimate candidate. The other two were knocked off. We'd had the stories about that while it was going on.

Q. Well, the "muddying of the Democratic waters", particularly in this context, they were raising against whom? A. Well, they were raising against Herb Hill and Alphonse Roy.

[35] Q. I mean the general election. A. Well, this was in the primary. In the general election the winner of this campaign would have run against Styles Bridges, because the guy that was running against him, Judge Leavitt, was a tacit opponent for Bridges. It never — he never carried any weight in the party.

Q. You mean Mr. Bridges would really have no opposition within his own party? A. Oh, no. No.

Q. And if there was a fight between his Democratic opponents, what did that mean to you? A. Well, in those days the Republican Party was a pretty well organized party. It had some outstanding candidates. It was pretty well understood within the party that Senator Bridges

was unbeatable, and the Republicans could sit back and watch the Democrats fight it out because the Democrats were always splintered. And one of the big problems ever since I started covering politics that the Democrats had was presenting what they called a balanced ticket. All of us who were writing about politics at that time, starting in the 1930's anyway, had been concerned with — had written stories about the attempt of the Democratic Party to present to the voters what was called a balanced ticket; [36] and there was always infighting in the Democratic Party because of its division into ethnic groups.

Q. I was getting to that. In his article, Mr. Pearson makes reference to the fact that "Irish Catholics may be inclined to vote for a Frank Sullivan while the French Canadians could be attracted by a name like Alphonse Roy." A. Well —do you want me to answer—?

Q. Go ahead. A. This situation was chronic in the Democratic Party. The French and the Irish always fought, and, of course, one of the outstanding Democratic nominees for any public office was John L. Sullivan, and I always thought that a large part of Frank Sullivan's vote was from people who remembered John L. Sullivan, who was a candidate for Governor way back in the '30's, who was Secretary of the Treasury under President Roosevelt and later was very active in national Democratic politics. He was an important and legitimate political figure in the Democratic Party in this state and in the nation.

Q. Well, this particular comment by Mr. Pearson, then, you thought was— A. A reference to John L. Sullivan and the similarity of names.

Q. That it was an appropriate political observation? [37] A. Oh, yes.

Q. Well, with regard to the political comment in the column, was there anything different in it that you hadn't already known other than the Lavallee telephone call? A.

No. Everything in it was familiar to me. We'd already printed most of it. And from time to time, as a political columnist — you see, besides being a reporter and then an editor for the Concord Monitor, I wrote a political column in the weekly press of this state. There were twenty weekly papers that used my column. I had used a lot of this stuff myself in the column I wrote that appeared in weekly newspapers. That's why it was familiar to me. The reference to Al Roy as a bootlegger I didn't consider anything unusual. I'm not even sure it hasn't been printed before, but apparently it hadn't been. I had known him by reputation around the state house as having been or—not being, but having been a bottlegger, certainly. In Washington, my office, when I was with Foster Stearns, was right next door to Arthur B. Jenks' office, and he was Mr. Roy's competitor. Roy ran against him for Congress, and he knew Roy was a bootlegger. He made that comment to me.

Mr. Reynolds: You may examine.

[38] *Cross Examination*

[By Mr. Brown]

XQ. Well, Mr. Shenton, is there anybody else who is dead that you want to say told you Roy was a bootlegger? A. You mean you want to know specifically—

XQ. Is there anybody else who is now dead that you want to say told you Roy was a bottlegger? A. I would think that, specifically in answer to that question, I think Gordon Eager.

XQ. Who? A. Gordon Eager.

XQ. Gordon Eager? A. "E-a-g-e-r".

XQ. Who is he? A. Well, he was—when Bridges was Governor, he was Bridges' secretary.

XQ. All right. Who else? A. It's pretty hard to pull

them out that far back. I have no other specific ones I could name.

XQ. How old are you, sir? A. I am fifty-two.

XQ. And in 1932, how old were you? A. Eighteen.

XQ. Eighteen. That means that you would have been twenty-two [39] when the contested election came up? A. What contested election?

A. You didn't know that Roy had one with A. B. Jenks?

A. I covered it from start to finish.

XQ. For the Manchester Union Leader? A. Yes. That's right.

XQ. Did you report anything at all that time about your supposed knowledge that Roy was known to be a bootlegger? A. I was the state house reporter. I wasn't the political editor.

XQ. As a matter of fact, this charge has not been in print until Pearson put it in print in 1960; you know that? A. Apparently not. I was surprised that it hadn't been.

XQ. You were surprised? A. Yes.

XQ. Tell me, sir, what did you do with regard to editing or checking the column that Pearson sent to that paper and that you printed on Friday — not on Saturday but on Friday, the day before? A. I would expect it was the same routine. Everything went through the same routine. Everything has to be checked and looked at and processed.

XQ. What about the one on Thursday? [40] A. The same routine.

XQ. Do you have any notes at all, sir, that you did anything at all with regard to this column that you printed on Saturday? A. I don't have any notes at all.

XQ. None at all? A. None at all. When I left the Monitor, any notes I would have made were left behind, thrown away. I cleaned out my drawers and files.

XQ. So, Mr. Shenton, when you're telling this jury that you read this column and there was nothing in it new to

you, this is just your recollection six years afterwards? A. Yes.

XQ. Did you write any memorandum of this situation down anytime between then and when you took the stand? A. No.

XQ. Have you given counsel for the defense any written statement concerning your knowledge and the procedures on this column? A. No.

XQ. You're sure? A. I'm quite sure. I don't remember giving them any.

Q. You have absolutely no notes of your own with regard to any phase of what you may have done on this column? A. I don't think so, no.

[41] The Court: We'll take a brief recess.

[Short recess]

After Recess

XQ. [By Mr. Brown] Mr. Shenton, over what years were you writing your political column? A. I started in the first of January, 1947, and I continued writing it until the summer of 1961.

XQ. '47 — '61? A. Yes.

XQ. And you had a column every week? A. Every week.

XQ. During that time, Mr. Roy was a candidate for major office on more than one occasion; you know that? A. Yes.

XQ. In your own column, did you ever report that he was a bootlegger? A. I don't think so. I don't know.

XQ. Did you ever report in your column that you heard any rumors that he was a bootlegger? A. No.

XQ. The Concord Monitor had a problem with some of its employees with regard to this tape you are talking about, didn't they? A. Yes.

[42] XQ. Are you sure that that tape — I'm talking

about this perforated tape that goes right on the machine. A. Yes.

XQ. Are you sure that was in operation in 1960? A. No. I guess it was not.

XQ. So you're wrong in your recollection on that, aren't you? A. That's right.

* * *

XQ. Well, what's the truth of the matter now? Was there a perforated tape on the linotype machine? A. No. In 1960 — I'm trying to think when tape came in.

XQ. It was after this column, wasn't it? A. I think it was after this column. My recollection is faulty because I handled it over the whole period.

XQ. Yes, sir. And that means, doesn't it, Mr. Shenton, that you have no actual recollection of handling this column at all? A. Yes.

XQ. All right.

[43] Mr. Millimet: Excuse me —

The Witness: The answer should have been "No", in disagreement with his question. Yes, I do recollect this column.

XQ. Sure. You've already told the jury that it was out on the galley rack, everything had already been automatically set — A. I was describing the routine which applied in the Monitor when I left.

XQ. All right. A. And it had been in effect for some time.

XQ. Now, I asked you before the recess what other dead men you wanted to refer to as having told you, as you say, that Roy was a bootlegger. Now, can you tell me any people still alive, that you say told you that? A. Well, it was such a general thing —

XQ. Please. I'm asking you specifically if you have any names of any people still alive that you say told you that? I want their names. That's all I want. Just their names.

Who are they? A. I guess I can't give you any. It's not that sort of a thing.

* * *

[46] XQ. You know that the Ballot Law Commission had decided that Sullivan was not a straw? A. Yes. And we had printed that fact.

XQ. Then why, sir, if you looked at this column at all, why did you print this column indicating that Sullivan was a straw when you knew the Ballot Law Commission had decided to the contrary? A. It doesn't say he was a straw.

XQ. It doesn't? You say that there isn't an insinuation in there that Sullivan was a straw, put in by Roy? A.No.

XQ. All right. Now, Mr. Shenton, you have told us that a fellow in your position on the Concord Monitor doesn't back-check the facts when something comes in for the purpose of being set up in type; correct? A. That's correct.

XQ. And in this instance, you made no effort to back-check the facts on Pearson? [47] A. I felt there was no need to.

XQ. But the fact of the matter is you did nothing, you made no effort to back-check the facts; correct? A. No. I made no effort. That's correct.

XQ. You took it as it came to you and you printed it? A. I don't think any changes were made in the column.

XQ. You didn't even proof read it after they set it up in type, did you? A. I don't do the proof reading. I noticed those same mistakes.

XQ. Now, I just have a couple of other things that I want to ask you, sir. First off, I want to ask you, since you've been a columnist and a reporter and an editor and everything else, why in this column there is all of the negative information about Senator Bridges? What's the journalistic reason for saying while Bridges knows nothing about it, he obviously isn't unhappy, and Lavallee, when asked "Did Roy say he was calling for his friend Styles?" denied

it? Why do you have all the denials in a story of this kind? What's your reason as you're writing a column? A. I didn't write this column.

XQ. I appreciate that, sir, but why daub it up with Styles Bridges? [48] A. Because Styles Bridges is a national political figure, he isn't just a New Hampshire figure; and this column goes to several hundred newspapers in the United States where the name "Bridges" would be known. For instance, in Iowa. They wouldn't know Alphonse Roy in Iowa.

XQ. Well, you say that you were aware of the Ballot Law Commission proceedings that were taken that Summer? A. Yes.

XQ. Was Bridges' name brought up in connection with those proceedings at the proceedings in any way? A. I did not specifically cover — I was an editor then. We had reporters who covered the hearings.

XQ. To your knowledge, was Bridges' name brought up in any wise in connection with those? A. To my knowledge, no.

XQ. Then my question again: Why, from a journalistic point of view — just to get additional interest in the column you throw a man's name in? Is that the significance?

* * *

[49] XQ. [By Mr. Brown] Look, Mr. Shenton, as a newspaperman, are you familiar enough with the way that you write columns to know whether there is a technique of saying, when somebody is charged with something and they deny it, you report the fact the charge was made and the denial? Are you familiar with that technique? A. If I understand your question, you mean in a political [50] column do we throw in a big name to attract attention?

XQ. Yes. A. Yes, we do. We throw in a big name to attract attention.

XQ. Whether there is anything that actually justified the name being thrown in or not?

* * *

A. That's right.

XQ. Ever talk to him on the telephone? Ever had correspondence with him? A. I've had correspondence with him.

XQ. About what? A. Well —

XQ. About anything involved in this case? A. No. Nothing involved in this case.

XQ. Now, there's just one other thing that I want to ask you about. Incidentally, you've testified before? This isn't the first case you ever testified in? A. I've testified before.

* * *

[52] XQ. [By Mr. Brown] Now, let me ask the question another way, Mr. Shenton. As a newspaperman, do you know what the connotation of the word "defamation" is — just talking [53] the English language—"defamation"? A. Yes.

XQ. This Pearson column we're talking about, calling Roy a former small-time bootlegger, as a newspaper man, do you recognize that the allegation of fact is defamatory of Roy?

* * *

A. No.

* * *

A. After all, a bootlegger is not a criminal in the sense that just about everybody still had to get liquor and somebody had to supply it back in those days. You have to put yourself back into the time of the '30's when I was coming into newspaper work. A bootlegger was a man who met a need. He supplied a need. And there was nothing very criminal about it.

[54] XQ. Even if someone were sent away to serve time,

there was nothing very criminal about it? A. Well, some of the big time operators, but we didn't have them around here.

XQ. Let me ask you this, Mr. Shenton: Are you aware of the fact that it was a crime to traffic in alcoholic beverages between 1920 and 1934 in the state? Are you aware of that fact? A. It was against the law to sell or buy, yes.

XQ. It was against the criminal law? A. Yes.

XQ. You know that? A. Yes. Everybody did it.

XQ. And so you say that you, as a newspaper man, you wouldn't recognize that calling a man a bootlegger in 1960, that that's defamatory? You wouldn't recognize it as being defamatory? A. If a man was bootlegging in 1960, yes, it would be defamatory, I suppose, because that's a different situation today than it was before 1933.

XQ. It's your position as a newspaper man passing on columns such as this that you wouldn't recognize that calling a man a bootlegger was defamatory at all, is that it? Is [55] that the way you want to leave it?

The Witness: Let me get the question again?

[Question read]

A. I don't think I'd want to leave it there, no.

XQ. Well, would you recognize that it was or wasn't probably defamatory?

* * *

XQ. [By Mr. Brown] Which way do you want to leave it? A. My way of understanding, it was the truth. What Pearson wrote was the truth.

XQ. If it were untrue, sir, would you acknowledge it was defamatory? A. If it were untrue, it would be defamatory. In this case, it was true.

XQ. You say? A. Yes. I believed it to be true.

XQ. But you have no independent evidence that it was true that [56] you can suggest to us? A. I never bought liquor from him.

* * *

Redirect Examination

[By Mr. Reynolds]

Q. Now, Mr. Shenton, you believe this article to be fair political comment about a candidate?

* * *

]57] A. Yes. I thought it was fair political comment.

Mr. Reynolds: No more questions.

* * *

[59] TESTIMONY OF FELIX LEPAGE

Direct Examination

[By Mr. Reynolds]

[Q. Will you speak right up and give us your name? A. Felix Lepage.

Q. Where do you live? A. 587 Maple Street.

Q. You live in Manchester? A. Yes.

Q. Your occupation, sir? A. I'm retired.

Q. And what did you use to do for a living? A. You want to go way back, or how far back do you want to go?

Q. Well, let's go back to the 1930's, sir. A. I was doing public accounting work until '31. I was appointed City Auditor in 1931.

Q. For the City of Manchester? A. City of Manchester.

Q. And how long were you the City Auditor of Manchester? A. Four years.

Q. Until 1935? A. The end of 1934, yes. '31, '2, '3 and '4.

Q. Sir, I'd like to ask you, during the period while you were working in City Hall, did you hear any rumors that Alphonse [60] Roy had been a bootlegger? A. Yes, sir.

Q. And what were the nature of those rumors, the

stories? A. Well, they were just talk that he had been a bootlegger at one time. Some of the city officials called him "Alphonse the bootlegger". That's all I remember.

Q. You have no personal knowledge of it? A. No, sir.

Q. This was just a general story around City Hall? A. Yes, sir.

Q. At that time? A. Yes, sir.

Mr. Reynolds: I have no further questions.

Cross Examination

[By Mr. Brown]

XQ. Mr. Lepage, at the time of which you speak, who was Cyprian J. Belanger? A. He was the City Solicitor.

XQ. And who was Dumais (?) Caron? A. He was the Mayor.

XQ. And at that time, sir, who was the tax collector of the city, or were there more than one? A. Well, there were two. Lee Grandmaison and I acted as tax collectors for a little while, but Lee Grandmaison was the [61] tax collector.

XQ. Now, at the same time that you're speaking of, for one term at least, Mr. Roy was an Alderman; is that correct? A. Yes, sir.

XQ. And was Alfred Fortin also an Alderman? A. Yes, sir.

XQ. You recall that that was the situation? A. Yes, sir. They both came from the west side.

XQ. They both came from the west side? A. Yes, sir.

XQ. If you recall, Mr. Lepage, who was spreading this rumor that Alphonse was — A. Several city officials.

* * *

XQ. Who? A. Well, Cyprian Belanger, for one. William Corbin, for another. The assessor — Mike Haley.

XQ. "Mark"? A. "Mike". Michael, I guess. He was

called "Mike". Those [62] are three I remember offhand now. There were others.

XQ. Felix, at that time was there some cleavage between the people that you've just mentioned on the one hand and Mr. Fortin and Mr. Roy on the other hand? A. Not to my knowledge.]

XQ. Not to your knowledge? A. No, sir.

XQ. Let me ask you, sir, if it isn't the fact that during this period you're talking about there was some question about one of your tax collectors, a shortage of accounts? A. Yes, sir.

* * *

[64] TESTIMONY OF WILLIAM MOORE

* * *

Direct Examination

[By Mr. Reynolds]

Q. Give us your name. A. William Moore.

Q. Your address? A. 1363 North River Road.

Q. Manchester? A. Manchester.

Q. And you're a retired police officer? A. That's right.

Q. When did you retire, sir? A. 1946.

Q. We have heard your name in connection with being on the Manchester Liquor Squad; is that correct? A. That's right.

Q. And you were on the liquor squad approximately from — what were the dates you were on the liquor squad? A. What?

Q. When were you on the liquor squad, sir, of the Manchester Police Department; in the '20's? Is that it? A. Yes.

Q. And up through the '30's, or early '30's? [65] A. Well, I was off and on. Not all the time.

Q. I see. While you were on the liquor squad, sir, back in those days, did you hear stories or rumors about Alphonse Roy being a bootlegger? A. That was the opinion.

Q. And this was a general opinion? A. In the section over there on the west side where he lived.

Q. But these were stories that you heard over where he lived? A. It was rumored, yes, at that time. It was general opinion.

Mr. Reynolds: Thank you. I have no more questions.

Cross Examination

[By Mr. Brown]

XQ. Mr. Moore, did you ever have occasion to investigate whether these rumors had any foundation in fact? A. No, sir.

XQ. Did you ever have any complaints given to you or to the police department, to your knowledge, indicating that these rumors were true? A. No.

XQ. Did you ever search any of Mr. Roy's property trying to find out whether they were true? A. No, I didn't.

XQ. When you say that these were general rumors over on that side, where did you hear them? Who told you?

[66] A. I couldn't tell you today. That's 43, 44 years ago.

XQ. Yes. I appreciate that, but there's no individual that you can recall who said anything to you? A. No, sir.

XQ. Was there anything beyond what you have told us as to these rumors? Did anybody say how or what he was doing or anything along that line? A. No.

XQ. Not at all? A. Not at all.

XQ. And over what period of time do you recall that you heard such rumors? A. Oh, I couldn't remember.

XQ. Well, were these rumors current after Mr. Roy became a member of the Governor's Council? A. Oh, no. Before.

XQ. Long before that? A. Long before that.

XQ. There wasn't any such talk while he was running for Congress, for example, in this area? A. Not to my knowledge.

* * *

[67] XQ. But you remember that in the earlier days there was some such gossip; is that right? A. That's right.

XQ. And you know no facts to back it up? A. No, sir.

Mr. Brown: Thank you, Mr. Moore.

Redirect Examination

[By Mr. Reynolds]

Q. Well, Mr. Moore, did you follow politics much in Manchester in the '20's and '30's? A. No, I didn't.

Q. And to your knowledge, your only dealing with Mr. Roy was back in that 1923 raid on Manuel's? A. Around that time, right.

Q. Where he was taken to the station? A. That's right.

Q. You were on that raid, weren't you? A. Yes, I was.

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[68] TESTIMONY OF DONAT CORRIVEAU

* * *

Direct Examination ...

Q. What is your name and address? A. Donat Corriveau, 45 Russell Street, Nashua, New Hampshire.

Q. How old are you, sir? A. How old? Seventy-five.

Q. And what do you do for a living? A. I'm the Register of Deeds.

Q. How long have you been Register of Deeds in Hillsborough County? A. It will be thirty-two years on the 31st of December, this year.

Q. Is that an elective office? A. Yes.

Q. And has it involved you in politics from time to time? A. Well, it has more or less.

Q. It's fair to say that you've been engaged in politics more or less for thirty-two years? A. Thirty-two years. Probably more.

Q. Now, Mr. Corriveau, in the course of your career, have you heard any stories about Mr. Roy's being a bootlegger? [69] A. Well, you know, when you're in politics and you're going around the City of Manchester, you hear different elements here and there, and so forth. There are a lot of rumors and a lot of sayings which describes sometimes what you say. That's the stories you hear. I met a lot of people who were opposed to Mr. Roy, and if there was anything they could say against him, they done it.

Q. In other words, you heard these stories? A. I heard them, yes.

Q. From his opponents? A. From his opponents, yes.

Q. They were used against him? A. They used that as an argument. I never could pin down the person who spoke about that, but you know how it is, they expressed themselves pretty definitely one way or the other.

Q. Now, have you ever had opposition from Mr. Roy in any of your contests? A. Yes. I had him in 1956.

Q. And what were you running for in 1956? A. Register of Deeds.

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[93] TESTIMONY OF ROYAL DION

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Cross Examination . . .

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[144] XQ. Well, Mr. Dion, do you say that in that 1956 race, do you say that Roy filed himself as a straw?

A. I don't believe he was a straw. I believe he was a candidate that was hoping to win.

XQ. All right. If that's so, let me ask you for the political facts of life the same way I did Donat. Is Roy going to be helped, running against you two fellows, by having six or eight more people from Manchester splitting up the Manchester vote? Is that going to help Roy or hinder him, as a political fact? A. It depends who they are. It depends who they are. I think a fellow by the name of Corriveau would certainly help him.

XQ. And that would help you too, wouldn't it?

[145] A. Yes.

XQ. And four years earlier when Roy wasn't in the race, the same fellow was in it? A. That's right.

XQ. So these people in Manchester, splitting up the Manchester vote six or seven or eight ways, isn't that actually going to work against Roy? A. Plus another French candidate in Nashua is not going to help Donat Corriveau or Royal Dion either. And also, I feel putting in two or three candidates of Irish descent certainly are not going to hurt Mr. Roy in Manchester.

XQ. Is not going to? A. No, because if there was only one Irish candidate, the vote would be divided so much he could walk away with the prize like happened this year, but these weren't straw candidates this year.

XQ. This year one Irishman licked the crowd, and the others were Franco-American? A. That's right. So if they had had a couple of other Irish candidates, the Irish candidate wouldn't have won.

XQ. And by putting in additional candidates, Irish, it helped you and Donat Corriveau just as much? A. No. Hurt me.

[146] XQ. How did it hurt you? A. Because I had a good following among the Irish people having been active with the Knights of Columbus.

XQ. You mean your Knights of Columbus work was a political activity to get the Irish vote here? A. No, sir. No, sir. I said as a result of my activities, I made a lot of friends who respected me and probably would have supported me as a result.

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Redirect Examination...

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[147] Q. Mr. Dion, when you were campaigning in 1956, did you hear any stories about Mr. Roy having been a bootlegger? [148] A. Well, I heard that around.

Q. You heard it? A. Yes.

Q. And did you use it in any way? A. No. I paid no attention to it because my experience with him at the outset was sufficient, and I just disregarded it, and I decided I'd have nothing to do with him, and that's it.

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[154] TESTIMONY OF ALPHONSE ROY

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Direct Examination...

Q. You are still under oath, Mr. Roy. You may be seated. Can you hear me all right? A. Yes. You talk a little louder, please.

Q. Certainly. Now, yesterday you were here when Mr. Felix Lepage testified? A. That's right.

Q. And he testified to the effect that in City Hall in 1933 he heard you referred to as "Alphonse the bootlegger". Did you hear that yesterday? A. I heard that, yes.

Q. And he testified in answer to questions from Mr. Brown that he got this from a gentleman by the name of Cyprian Belanger; is that right? Do you remember that? [155] A. I didn't hear that, but if he said it, that is all right.

Q. I just want you to tell us who Cyprian Belanger was. A. He was an attorney.

Q. He was more than just an ordinary attorney, wasn't he? Wasn't he the City Solicitor? A. Yes, he was.

Q. He was the lawyer for the city? A. That's right.

Q. And Mr. Lepage also said he got this information from William Corbin, didn't he? A. That's right.

Q. And who was William Corbin? A. Well, he had been an Alderman for many years. Then he became tax collector.

Q. So he had been in the city government as an Alderman, and at that time he was tax collector, in — A. I don't remember that he was at that time, but he became tax collector shortly after that.

Q. But he had been associated with the city government for a long while? A. Yes.

Q. And Mr. Lepage also said that he got this information from Mike Healey. Who was Mike Healey? [156] A. I don't know what Mike Healey he meant.

Q. Well, there were two Mike Healeys, were there? A. I knew one Mike Healey. I don't know if that's the former assessor. I don't know if that was his first name.

Q. What about Mike Healey the Chief of Police? Wasn't there a Mike Healey that was Chief of Police? A. Oh, yes. Yes.

Q. Now, Mr. Roy, do you remember when I took your deposition? You remember that? A. Yes.

Q. And do you remember that I asked you if you didn't agree that if a candidate for public office was a bootlegger that the press had a right to publish it? You remember that? A. Yes. If he had been convicted.

Q. No, no. I didn't talk about that. I'm just saying if he had been a bootlegger, the press had a right to publish it; isn't that what I asked you? A. When you asked me that

question, I had in mind if a man was convicted for a bootlegger that the press would print it.

Q. Well, don't you think that the question of whether a man is a bootlegger is an important thing for the public to know when a man is running for office? A. If it's proven that he is.

[157] Q. And don't the people have a right to know the character of the man they're voting for? A. They would have a right to know if he is.

Q. Right. A. But if he isn't —

Q. And —

Mr. Brown: May the witness finish his answer?

Mr. Millimet: I'm sorry.

Mr. Brown: You were going to say, if he isn't — what?

A. If he is convicted, they would have a right to publish it.

Q. Well, you know, don't you, that there were a lot of bootleggers that weren't convicted? A. I assume that's right.

Q. Well, if a man had been a bootlegger, they'd have the right to put that — to publish it whether he's been convicted or not, wouldn't they? A. I've never seen anything in the press about calling a man a bootlegger unless he was and he'd been convicted.

Q. You mean if a man conceals the fact he's been a bootlegger that the public has no right to know that?

A. I never knew of any newspaper publishing that a person was a bootlegger unless they were absolutely positive that he [158] was and he was convicted.

Q. That's not what I'm asking you. I'm asking you about the voting public, Mr. Roy. If a man had in fact been a bootlegger, if there was evidence that he was a bootlegger, even though he hadn't been convicted, don't you think the public has a right to know whether a man is a bootlegger or not? A. If it's right, they would have a right to know, but it wasn't right.

Q. I understand your position that it wasn't right. Are you saying that these stories about you had no foundation whatsoever? Is that what you're saying? A. Absolutely not.

Q. That Mr. Healey, if he told this to Mr. Lepage, he was lying to him, the Chief of Police.

* * *

[159] A. I will answer the question this way, Mr. Millimet: I have my own opinion, and I don't believe that the Chief of Police ever told Mr. Lepage that I was a bootlegger because I wasn't.

Q. I understand that you deny it, Mr. Roy, but all that I'm asking you is this: If in fact you had been a bootlegger — or anybody. Let's not apply it to you — I just want to discuss it in general terms. You saw Mr. Roy here on the stand? Remember him? He testified that he had been a bootlegger, didn't he? A. Yes. he admitted it.

Q. And he testified that he was never arrested or convicted; isn't that so? A. That is right.

Q. And if he were the candidate for United States Senator, wouldn't you think it was proper for this to be reported? A. I don't believe any newspaper would publish that he was a bootlegger because he hadn't been convicted.

Q. I didn't ask you about that. I asked you if it wasn't proper for the public to know it in order to pass on the qualifications of the candidate. [160] A. I don't believe it is proper for anyone to call a man a bootlegger when he isn't, regardless of whether it's a newspaper or an individual.

Q. I understand that, but I'm saying if it in fact occurred, then it is proper; isn't that right? A. It is not proper in my opinion.

Q. You don't agree? A. I don't agree with you at all.

Q. You don't agree that a man's character is put in evidence when he runs for the United States Senate?

A. I don't believe in assassinating a man's character unless you have proof, unless you have a record.

Q. Your position is that unless a man has been convicted that he isn't a bootlegger, is that the idea? Is that your position? A. I have no way of knowing.

Q. No. That's not what I'm asking you. Your position that you take is that unless a man has actually been convicted, that it's of no public interest that he's a bootlegger; is that your position? A. I will have to stick to my opinion, that a man should not be called a bootlegger unless he is convicted and proven that he is.

[161] Q. Didn't you know, Mr. Roy, that these stories about your being a bootlegger were widely circulated? A. I never knew of any such circulation, any such stories, until 1960.

Q. You mean to tell me — A. Never heard of it. They might have spread that whispering campaign when a man is running for public office. They will use everything against him to hurt him. They might have said something else about me unbeknown to me.

Q. And you want to say — A. But it never came to my attention.

Q. — that you never heard that the people at City Hall referred to you as "Alphonse the bootlegger"? A. Absolutely not.

Q. Never heard it? A. I have heard something about my brothers.

Q. No, no. You didn't have any brothers named "Alphonse", did you? A. What's that?

Q. I say you didn't have any brothers named "Alphonse"? A. No.

Q. You were the only Alphonse Roy, so if Mr. Healey and Mr. Corbin and Mr. Belanger were telling Mr. Lepage that [162] there was an "Alphonse the bootlegger", Alphonse Roy, it had to be you, didn't it? It couldn't be your brother? A. Don't you think that they could be confused

between me and my brother inasmuch as they had paid a fine before?

Q. Mr. Roy, I'm not asking you about that. I'm asking you, if they were telling that it was Alphonse Roy, it had to be you they were telling it about? A. I'll say they said it — if they said it at that time, they were telling a falsehood, because I wasn't.

Q. And you never engaged in anything in connection with liquor? A. I never sold one drop of liquor in my life.

Q. I understand that, but you did — you were present when this place was raided? A. I was.

Q. You did knock the glass out of Mr. Chapman's hand? A. I don't recall that, and I told the story when you had me on the stand. There was a lot of commotion in that place at that time. We were rushing to get out of there, and the man ahead of me might have touched that officer unbeknown to me. I never heard of anything like that until the report was released by the police department.

Q. Well, what do you say now about your statement on the stand [163] earlier in this case that you were just invited to the police station? A. That still stands.

Q. Excuse me. Let me finish the question — and that you simply sat in the Chief's office and then they let you go. You say that's true? A. I don't know if it's the Chief's office, but I sat in the office there and waited until Mr. Gorey came along.

Q. Do you deny that you were put in a cell and that your money was taken and counted? A. Absolutely. I deny that. I've never been in a cell in my life.

Q. You deny the records of the police department? A. I have no desire to contradict this individual here, but I know what I remember, what happened; and if I had been in a cell, I would remember it.

Q. Sure you would, wouldn't you? A. But I have never been in a cell at any time.

Q. How about the money they took from you? You say that you didn't have $131.00 in your pocket? A. That's another thing that I don't remember.

Q. Don't have any memory about it? A. I've never been booked. I've never been in a cell. I was [164] asked to go to the station. I was questionesd by Mr. Gorey about my brother.

Q. Just a polite invitation? A. Absolutely. He didn't — he was a friend of mine. He hated to see my brother in that game. And he said, "This is the first offense. Second offense could be more trouble and he might go to jail. I wish you'd talk with him and try to make him understand he should give it up."

Q. And you never were in a cell? They didn't put you in a cell at all? A. Absolutely not.

Q. And this is at a time when you were making $17.00 every two weeks; isn't that right? A. Yes. Part time. Sometimes it was less than that.

Q. Right. And if you had a hundred and thirty-one dollars in your pocket and you were arrested in a speakeasy for resisting arrest, and if you —

Mr. Brown: Just a moment.

A. I did not resist arrest, Mr. Millimet.

Q. Excuse me. I apologize. I made a mistake. If you were arrested in a speakeasy with a hundred and thirty-one dollars in your pocket, and if you were arrested for interfering with an officer who was trying to get [165] evidence in that speakeasy and you were — excuse me, now. Let me finish — and you were taken to a cell and your money was taken, don't you think somebody might think you were a bootlegger, that you were involved in the operation in some way? A. At that time I didn't have a hundred dollars in my pocket. It was depression time. It was hard. And I didn't have any money, so I didn't have a hundred and thirty dollars in my pocket.

Q. I understand that you are saying that now, but if it's true, if the police records are true, if what Mr. Chapman's diary shows, if what Mr. Suosso's diary shows, and if the record about you being put in a cell and the money taken from you in connection with this raid is true, don't you think somebody might reasonably think that you were associated with that operation in some way? A. I was never associated with that business in any way.

Q. I understand you're denying it, you're denying you were put in a cell. I'm asking you to assume that your memory is at fault. I'm asking you to assume that the record is right. Now, if those records are right, don't you think somebody might reasonably think that such a person — A. I don't remember it and I don't believe that I was in that [166] cell and I had a hundred and thirty dollars in my pocket.

Q. I understand you deny it. A. I was only questioned by Lieutenant Gorey. That's all I can remember.

Q. I understand that's all you can remember. A. I can't tell you any different.

Q. I'm just asking you this: Don't you think that if all those things did happen that somebody there in the police department might think you had something to do with it? A. I can only say the same thing, that I don't remember being in a cell and I don't remember — I was never arrested and I never was under the impression that I was arrested until that report was released by the police department.

Q. You knew that people around town regarded this as "Roy's place", this near beer saloon; isn't that right?

* * *

[167] Q. . . . That was known as "Roy's place", isn't that so? A. I suppose so.

Q. And isn't it so that your other brother, Emile, was also in the liquor business? A. Well, he pleaded guilty. He paid a fine, too, way back. Not in Manchester.

Q. No. He was in Franklin? A. That's right.

Q. And he was arrested more than once, wasn't he? A. Just once.

Q. Just once. And wasn't it widely known that this was "Roy's place" on Main Street? Isn't that the way it was identified? A. Yes. My brother's name was "Roy".

Q. All right. Now, if the situation was that when this arrest occurred it was "Roy's place" and you're both taken to the station and you have a hundred and thirty-one dollars in your pocket and the man who says he was waiting on the customers has only fifteen dollars, don't you think somebody might believe you had something to do with the place? A. I emphatically deny that I had a hundred and thirty dollars [168] in my pocket, and I emphatically deny that I was arrested. I was asked to go to the station.

Q. But, Mr. Roy, won't you even agree that if you're mistaken that someone might reasonably believe— A. I'm not mistaken about that, about that time.

Q. You're not mistaken? A. I am positive.

Q. Despite the records, you're absolutely certain? A. I'm positive. I'll always remember that incident.

Q. What do you mean when you say you're not mistaken about that time? Is there some other time? A. Because I happened to be in there with a friend of mine, and it was unfortunate that I was in there, and I wanted to get out of there. I didn't want to be implicated in that business because I was always against it. And I succeeded after to sell him the idea, with the cooperation of the Police Commissioner, to get him out of that business. He gave it up after, and he went back to the shoe factory where he used to work. They never had any more trouble with him.

Q. And you just emphatically deny the whole police record about your being in a cell and having a hundred and thirty-one dollars? [169] A. It's unfortunate that I have to say what I believe and what happened are in contradiction

probably with the record, but I am telling you honestly that I never was arrested, in my opinion, never knew that I was, never was under that impression, and never had a hundred and thirty dollars in my pocket in those days.

* * *

Q. . . . You just deny the whole thing, say it never occurred? A. I deny that I ever sold any liquor, that I was ever affiliated with any speakeasy, and I deny that I was under the impression I was arrested, and I deny that I had a hundred and thirty dollars in my pocket.

Q. You deny the police records, then, as they exist? A. If you call it that way, that's the way it is.

Q. Well, is it fair to say, Mr. Roy, that when a man runs for the United States Senate that people have a right to know all about the character of that man? A. I suppose so. [170] Mr. Millimet: That's all. Thank you.

Cross Examination

[By Mr. Brown]

XQ. When you were asked that question on your deposition by Mr. Millimet, you indicated, didn't you, that they are entitled to know it if it was true? A. That's right.

* * *

XQ. . . . Page 64. Were you asked this question and did you give this answer — Mr. Millimet making the inquiry — starting with Interrogatory 412 —

* * *

XQ. . . . "I am not asking you if something was so. I am asking you if they should have the right. Don't you [171] think that is something people have a right to know when they vote for a man?"

Your answer: "I suppose the people should know the character of the man they're voting for."

Next question: "Wouldn't you want to know if a man had been a former bootlegger?"

Your answer: "Yes. Yes."

"That has something to do with a man's candidacy?"

Your answer: "Yes. When it is not true, I don't believe they should publish anything like that."

Is that what you said? A. That's right.

XQ. Is that still your position? A. That's my deposition.

XQ. But is it still your position today that if it's true, the public has a right to know it if you're a candidate? A. Absolutely.

XQ. And what is your view if it is published about you and it's false? A. Then they're assassinating my character.

XQ. And with regard to this whole — you've heard all the evidence in the case, haven't you, Mr. Roy? A. Yes, I did.

[172] XQ. With regard to the whole area of evidence that's in here about bootlegging, have you at any time, ever, had any connection with bootlegging? A. Never in my life.

XQ. And I asked you this before when I put you on in your own case — you're willing to stake your reputation on it? A. I will stake my reputation.

XQ. All right. Now, while you're on the stand, Mr. Roy, I want to ask you about one other portion of the evidence. You recall that yesterday Royal Dion said that he was in contact with you on two occasions in 1956 with regard to the Register of Deeds race? A. That is right.

XQ. Tell the Court and jury what happened the first day, first time you met him. Did he come to you or did you go to him? A. He came to my office.

XQ. Tell them what happened. A. He came to my office and he introduced himself. I had known him in a public way, but I had never spoken to him. He said he was a

candidate for Register of Deeds, and he says, "I heard your name mentioned in connection with that office." He said, "I would like to know if you really want to run?" I told him that I was undecided, that my name had [173] been mentioned but I would decide it in the near future. Then he pleaded with me not to run. He said, "You should run for a major office. You made it before and possibly you can make it again, and if you do I will be glad to get you some contributions. I will help you if you keep out of this race." Then he spoke about the connections he had. He says, "The young Democrats in Hillsborough County are very strong. They're very well organized. They want new blood. They want to get that position of Register of Deeds. This fellow has been there long enough. He's been saying from one term to another it was his last term and," he says, "now we're out to get that office, and many good friends of mine are favoring my candidacy and I have a lot of support in Nashua and I have some support in Manchester." I remember him mentioning Mr. Devine and mentioning that he had some high officials or individuals in the Knights of Columbus that would do some underground work for him. And I listened to him. I listened to him and I still said that I was undecided as far as I was concerned and I couldn't give him any answer.

XQ. Now, was there any discussion that first time around with regard to other possible candidates? A. At that time I don't — he was the only candidate, with the [174] present Register of Deeds. I don't — I'm not sure, but I had in mind, if I recall, there was another candidate from Manchester, but I'm not sure who he was, but he wasn't too well known. I can't recall his name.

XQ. But as between you and Dion, the first time that he came to you, did you and Dion discuss any other possible candidates? A. I never did. He asked me that first time, he asked me if I knew of anybody that would aspire for that

office. I didn't know at that time. But the second time he came in —

XQ. All right. Now, the second time what happened? Where did the second meeting take place? A. He came to my office again.

XQ. He came to your office? A. That's right.

XQ. Tell the Court and jury what happened. A. He came in and asked me if I had made up my mind. I said I was still undecided, some people came to me to see if I would be interested but I would like to know who is aspiring for that office in Manchester.

XQ. This is what he's asking you? A. He's asking me if I was going to aspire for it. I told him I was undecided, but I had in mind, and I remember [175] telling him, "I don't know who is running in Manchester. There might be some candidates." I always had in mind that if I was the only candidate —

Mr. Millimet: If the Court please, I don't mind his detailing the conversations, but I don't think he should testify as to what he had in mind. If he wants to contradict the witness, let him do it but not say what he had in mind.

XQ. [By Mr. Brown] Just tell the Court and jury, Mr. Roy, what happened the second time. What was the discussion between you and Dion the second time around? A. Well, he asked me for some names, some people. He wanted me to introduce him to some individuals who could get him some votes. I then told him that I was unable to start campaigning for him because it was very possible that I might be a candidate myself, having in mind that if I was the only candidate in Manchester I would have won that nomination.

Mr. Millimet: Excuse me. I object.

The Court: Sustained. Not what you had in mind.

XQ. [By Mr. Brown] Did you have any discussion with Dion, either time, about whether he should get straws or

whether [176] you could get straws for him? A. There was never any question about straws at any time. He never spoke about it and I never did, but he did ask me who were the potential candidates. I was unable to tell him.

XQ. Was there any discussion at that time between you and him in which the name of Mr. Spanos came up? A. Yes.

XQ. What was that? A. He asked me if I had in mind that he would aspire for that same office. I told him I didn't know, it was up to him to see him.

XQ. Well, let me ask you just one other thing in this matter of straws, Mr. Roy. What do you say, did you ever suggest to Dion that he get straws or that you could get them for him? Did you at any time ever suggest that to Royal Dion? A. Your Honor and members of the jury, may God be my judge, I never discussed any question of straw candidates with Mr. Dion at any time.

* * *

[179] *Before the Jury*

Mr. Millimet: May it please the Court, subject to the discussion concerning the exhibits, the defendants rest.

Mr. Brown: If it please the Court, the plaintiff has one rebuttal witness . . . ,

[181] Mr. Brown: Mr. Zwicker.

Mr. Millimet: May we approach the bench, your Honor?

The Court: Yes.

At the Bench

Mr. Millimet: The easiest thing for me to do would be to ask my brother to give the Court the affidavit he has in his hand. You will see why he wants this witness.

Mr. Brown: My brother got a copy of the affidavit at the same time I did. We both have it.

Mr. Millimet: That's right.

[Submitted to the Court]

The Court: May I assume that is in the nature of an offer of proof, that that will be his testimony?

[182] Mr. Brown: No, your Honor. I haven't made any offer of proof. I was invited up to the bench by my brother before I even had the witness sworn. I obviously can't make an offer of proof without a witness under oath on the stand.

Mr. Millimet: If the Court please, we object to any evidence of what any other paper did. We ask that my brother make an offer of proof because once we embark on this thing we are going to run into the problem we had with Mr. Blalock. And I'd also like to object on the additional grounds, which I think are perfectly sound, that this is not admissible on the conduct of the Concord Monitor and that it is not rebuttal as far as NANA is concerned since there's been no evidence on NANA in the defendants' case.

Mr. Brown: May I say this, your Honor. The witness Shenton testified that there was nothing unusual in this column that [183] prompted him to do anything other than print it; and part of the problem in this case, one of the issues, is whether or not this column was so obviously defamatory on it's face that anyone proposing to publish it would recognize that fact and recognize that it should not be published without some investigation of the facts, that otherwise this would be a publication in reckless disregard for whether it was true or false. Now, since that is an issue in the case, I propose through this witness to take evidence that the character of the writing is so obviously defamatory that it should not be published

without an investigation even though it comes from Drew Pearson.

Mr. Millimet: Well, of course, as far as the Concord Monitor is concerned, it should be judged by its own knowledge and not someone else's. Mr. Shenton testified about his particular knowledge.

[184] Mr. Brown: I don't think the jury is required to believe anything that Enoch Shenton stated. I think he stated his name correctly, but I'm not satisfied that anything else he said becomes as a matter of law true or is required to be entertained by this jury as being true. I think he took the position that there's nothing unusual in the column. I think as a matter of rebuttal I'm entitled to produce equally competent people who recognized that there was. I was prevented by the Court's ruling from showing the same situation existed in Portsmouth, and the argument then became that just because one newspaper publisher recognized it is no evidence that all newspaper publishers would or should. Here we have another one.

The Court: Well, that's what I wanted to ask you. Do you say this is any different than Blalock's testimony?

Mr. Brown: Yes, your Honor. The other people [185] went through an investigation and cleaned it up. These people, not having time to investigate it, didn't publish it at all.

The Court: But in principle it relates to what they did in regard to the article.

Mr. Brown: You will find on the record — Mr. Millimet argued at great length that I had established the standard by which newspaper people are to be held through Blalock. This is after the evidence I had produced the man for was excluded. And he is attempting to hang me on Blalock. He is trying to set up a situation where I am bound by Shenton. This is on the question as to whether this article

was defamatory to a degree that it was obvious. Now, this has some bearing on whether there is any duty on the part of people publishing or whether they are entitled willy-nilly to publish it without regard to whether it's true or false. All I'm [186] getting to, your Honor, is that it is not as a matter of law sound to assume that because Drew Pearson wrote it that people may assume that it is non-libelous. It's not the fact at all. No such presumption exists as a matter of fact or as a matter of law; and here is another situation where a competent, I trust, newspaper, recognizing the obviously defamatory nature of the matter, took whatever action it did.

Mr. Millimet: I say if it's relevant at all, it's only for the Court, your Honor; and when my brother refers to what I've said, I was referring to the question for the Court, not for the jury. I think this is hopelessly prejudicial. It's a collateral. We're going to get off — then I'll have to ask for leave to reopen and put on the other two papers that did print it. If we're going to get into what each paper did, [187] we can be here forever. I think the law of the trial has been established that this is not admissible.

The Court: I'll sustain the objection.

Mr. Brown: Well now, do I understand, your Honor, that I'm not entitled to put this man on?

The Court: No. I haven't ruled that you can't put him on.

Before the Jury

Mr. Brown: Is my exception noted?

The Court: Exception noted.

Mr. Millimet: Mine also, your Honor.

The Court: Exception noted.

[188] TESTIMONY OF KENNETH F. ZWICKER

who was called by the Plaintiff, and having been first duly sworn was examined and testified as follows:

Direct Examination

[By Mr. Brown]

Q. What is your name, sir? A. Kenneth F. Zwicker.

Q. Where do you live? A. My home address is Marlboro, New Hampshire.

Q. What do you do for a living? A. I'm the assistant publisher of the Keene Evening Sentinel.

Q. And that's a what, a daily, a weekly or what?

A. It's a daily newspaper in Cheshire County.

Q. In the summer of 1960, what was your position with that newspaper? A. I was the assistant publisher of the paper.

Q. At that time — and I'm talking to the period of the summer of 1960 — did the Keene Evening Sentinel have a continuing arrangement to purchase the Drew Pearson column, the "Washington Merry-Go-Round"?

Mr. Millimet: I object, your Honor. It's been agreed.

* * *

[189] [By Mr. Brown] Do you recall, sir, at the Sentinel in the summer of 1960 who the person was that edited the Pearson column? A. Yes. I was that person.

Q. You are — were — that person? A. That's right.

Q. I show you Defendants' "B", which at the top of it says "Bell Syndicate. Drew Pearson Merry-Go-Round. Released Saturday, September 10, 1960." I want to ask you, Mr. Zwicker, whether you recall having had that column come across your desk at the Sentinel at that time?

Mr. Millimet: It's been agreed it was sent to the Sentinel, your Honor, in the pre-trial order.

The Court: I guess the question is whether or not the witness recalled it.

* * *

[190] A. Yes, I recall the column.

Q. You recall it? A. Yes.

Mr. Brown: Well, I guess, your Honor, before I ask the next question I better ask for a bench conference to be sure the next question is going to be allowed to be asked.

At the Bench

Mr. Brown: I propose to ask the witness whether the Keene Sentinel printed the column and ask for a yes or no answer.

Mr. Millimet: I think it can only be for prejudicial purposes. It's already been agreed as to which papers printed it, and I object to going into it any further. It's only going to lead to trouble.

The Court: The mere fact that it might be cumulative doesn't mean that it is not admissible, does it?

[191] Mr. Millimet: What purpose can be served, your Honor, by showing that they did not publish it unless we're going to go into why they did not publish it, and "why" has been ruled out?

The Court: I will allow him to answer that question, but I'll sustain the objection to going into why.

Mr. Reynolds: Our exception.

The Court: Exception noted.

Before the Jury

Q. [By Mr. Brown] Now, Mr. Zwicker, I want you to give me just a plain yes or no answer to this question: Did the Keene Sentinel publish that particular Pearson column? A. No.

Q. Now, I don't want to — I'm not going to ask you any further about that particular situation. I want to be sure you understand that. Let me ask you, Mr. Zwicker, generally — generally — if material is submitted to the Sentinel which —

Mr. Millimet: Of course, I think Mr. Brown is about to do just what — about to do [192] indirectly just what the Court has ruled as a matter of law he cannot do directly. I object to it.

The Court: I assume Mr. Brown will not try to do indirectly what the Court has ruled he cannot do directly.

Mr. Millimet: I think it's inevitable under the circumstances of the testimony. I'd like to approach the bench again, your Honor, because I don't see how it can be avoided.

The Court: Very well.

At the Bench

Mr. Millimet: He has brought out through this witness that the Keene Sentinel has not published this column. Now he's going into discussing with the witness what you do before you publish a column, and it's going to put us in a hopeless position that if we don't ask him what happened in this case, the jury is going to conclude that he didn't publish it because there was something wrong [193] with it, and I can't see how this prejudice can be avoided. That's exactly what he's going to ask him right now.

Mr. Brown: Well, if it please the Court, I will make an offer of proof that this witness, if I am permitted to examine on the subject, will testify that when material is submitted for publication which contains an obviously defamatory attack upon an individual, that newspapermen generally, and the Keene Sentinel specifically, do not

publish an obviously defamatory attack upon an individual without checking the accuracy of the story, and in instances where the required checking is an unwarranted burden on that newspaper staff that they do not publish at all. And further, following that offer of proof, I will ask to have marked for identification only — I do not propose subsequently to ask that the restriction [194] for identification be stricken — the affidavit of James A. Ewing, of the Keene Sentinel, and the affidavit of this witness, which have been previously made available to both sides in regard to that situation.

The Court: Do you object?

Mr. Millimet: Yes.

The Court: I will exclude the evidence as to what the Keene Sentinel does or did. I will sustain the objection to that. As I recall it, the witness Blalock was allowed to testify about what newspaper publishers or editors or reviewers of columns, what they did in general.

Mr. Millimet: Yes, but the thing that bothers me, your Honor, is having now insisted upon bringing out that the Keene Sentinel did not publish the column and then going into this in the very next breath as to what newspapers do can only result in a hopeless prejudice to the defendants. We would then have to go into the whole [195] question of what an investigation would disclose and all that stuff, which the Court has ruled out. I think we'd be almost hopelessly prejudiced. How can I defend myself against it?

Mr. Brown: You can't because there is no newspaperman of any responsibility that would say anything different, and you know it.

Mr. Millimet: How can my brother say that when two other newspapers published it as it was?

Mr. Brown: In reckless disregard for its truth or falsity.

Mr. Millimet: We have five papers. Three published it as it was, one didn't publish it at all, one published most of it. It just puts me in a hopeless position to be allowed to do this — for him to be allowed to do this now.

The Court: Isn't this the same type of evidence that Blalock testified to?

Mr. Millimet: No, it isn't.

The Court: What do you say?

Mr. Millimet: I'll tell you why it isn't, if it is [196] permissible.

The Court: Yes.

Mr. Millimet: Because Blalock published the column and this fellow didn't publish the column. That's one of the things I want to make a motion about anyhow.

Mr. Brown: Your Honor, the prejudice that is involved here is prejudice to the plaintiff because the Court's previous exclusionary ruling with regard to the situation of the Portsmouth Herald deprived the plaintiff of an opportunity to put before the jury that competent newspapermen, faced with an obvious libel, did in that instance check it out and get rid of the defamation before they published. This is a situation where a second newspaper, similarly alert, not having the time or the staff to check it out, entirely refused to publish it. Now, I don't think, to be quite frank, I don't think that the prejudice already caused plaintiff by [197] the exclusionary ruling is going to be overcome by this evidence. I have made an offer of proof as to what it would be, and all I would like is a ruling one way or the other. If I have to rely on exceptions, I'll rely on exceptions.

Mr. Millimet: I'm not satisfied to rely on exceptions, your Honor. I just feel it's hopeless for the defendants — hopelessly prejudicial to the defendants.

The Court: I guess we'll take the noon recess at this

time, Mr. Foreman and gentlemen, and we'll return at 2:00 o'clock.

[Recess for lunch at 12:35 p.m.]

In Chambers

[Portion of Blalock testimony submitted to Court and counsel]

The Court: I wanted to see that because I thought that is what I had done in the case of Blalock, and even though I'm wrong, I want to be consistently wrong.

Mr. Millimet: Well, of course, my objection is that [198] you've done something different in this case. You haven't done anything yet on this question, but if you permit this man to testify along this line after he has testified that they didn't run the column, then you're raising an inference —

The Court: You agreed, didn't you, that he didn't run the column? As I remember, it's part of the agreement.

Mr. Millimet: I objected to going into it at all with this witness. I understand I agreed, but that was for the purpose of circulation, and it was agreed in the pre-trial. I objected to this witness even going on the stand because I knew what was going to happen. I thought that — I knew that he hadn't run the column. I felt that we couldn't go into this without the problem arising which I'm now concerned with. What am I going to do? Mr. Brown puts him on the stand and [199] says, "When you get a column and you don't know whether it's true or false, what do newspaper publishers do?" And he says, "Well, we try to check up on it," and then he sits down, and then what do I say? "Well, why didn't you run this column?" Do I just sit down? What do I do? I can't do anything to protect myself.

The Court: I'm sure you'll think of something.

Mr. Brown: May I invite to your Honor's attention the plaintiff in this case filed interrogatories directed to NANA and the defendant NANA objected to all but one of those interrogatories, stating as the basis for their objection that what we were asking them to state in the interrogatories was their defense to this action, and on that basis, citing the statute that prevents our getting at their defense, they declined to answer the interrogatories, and on that basis Judge Grimes excused them, and [200] those interrogatories asked what investigation NANA did, who if anyone edited for NANA, and all the rest of the questions in this area. Now, I'm calling this to the Court's attention for this reason. This position by the defendants was taken in 1965, after Times and Sullivan and these other cases were down. What I'm trying to bring to your Honor's attention is this: Your Honor has indicated — although I understand your Honor has not yet ruled — that your Honor feels perhaps the plaintiff has all of the burdens of proof in this case. We were prevented by the defendants from getting the specific information as to what these defendants did in the way of investigation, if anything at all was done, to determine truth and falsity, on the basis that they were going to present it in their case; and the interrogatories and the motion to be excused and the [201] order are part of the file which your Honor has. Now, it's under those circumstances, your Honor, that it becomes necessary for us to go into this matter in a different manner, making use of witnesses who are available to us, and this is why I say that your Honor was led into error in the exclusion on Blalock, which, as the excerpts that the Court has provided counsel, indicate was covered generally rather than specifically in this case. We're proposing, of course, to do precisely the same thing with this witness, and I have in mind asking him what, as a newspaperman, or what

newspapermen generally would do if they had a piece given to them for publication saying that Lyndon Baines Johnson was a shoplifter, that type of thing. Personal attack on an individual. What would they do? And I think under the circumstances of this case and the [202] Court's ruling to date in this area that that is the only avenue that is left open to me, and that's why I say the entire situation is somewhat prejudicial. If we had been able to compel the answers to the interrogatories, we wouldn't be in this position of not having that evidence. At that time, 1965, the defendant acknowledged that proving what investigation, if any, NANA did was part of their case, not ours, and we have proceeded to trial under the rules of the Court on these pre-trial discovery efforts, and we come in in the status that we're in here now. Now, I don't think that under those circumstances that it lies to the defendant to say now, as my brother has been arguing for the last two weeks, that those matters are matters in the plaintiff's case on which we had the burden, because if we had the burden, we had a right to have the answers to [203] those interrogatories. It's unfair for the defendants under these circumstances to be changing its position, and I think it is a radical change of position which prejudices the plaintiff, not the defendants. If your Honor wants to take a look at the interrogatories, I'm speaking specifically of Interrogatories 7 and 8 on this particular aspect of our present problem.

Mr. Millimet: Well, if the Court please, we have cooperated in producing anybody at the trial my brother wanted. If he wanted NANA here, he could have asked us to produce them. He wanted Drew Pearson here and we agreed to produce him. If he wanted to take depositions of the people involved, he could have taken depositions of the people involved.

Mr. Brown: Under this order, that it was a part of your

case, I could not have inquired into the area, and you know it.

Mr. Millimet: That's not so. There's a lot of [204] difference between taking depositions and motions for discovery.

Mr. Brown: Can we get the evidence closed?

Mr. Millimet: Wait a minute. You're raising an issue. I think I have a right to answer it on the record.

Mr. Brown: Yes, you do, but when you start a general lecture on what our New Hampshire procedure is, I'm entitled to object to it.

Mr. Millimet: Well, you're entitled to object. Mr. Brown is the New Hampshire man on libel. He's tried more libel cases than anybody else. He knew what he was doing. If he wanted to get the deposition of somebody at NANA, he would have asked me to produce them. If he wanted somebody from NANA here, he would have asked me to produce them, and he didn't do so. I don't think he should be allowed to do indirectly what he wasn't allowed to do directly. That's all he's doing this for, and I [205] don't think it's admissible as against NANA, in any event. He's talking about NANA now. And I don't think that this witness whose testimony he proposes to offer is admissible against NANA. I don't know what he's even referring to NANA for and to the interrogatories filed against NANA. I don't see what it's got to do with it. Before lunch I thought he was offering this on the question of the Concord Monitor. He said the reason why he wanted to produce this man was because Enoch Shenton had said something on the stand, and that has only to do with the Concord Monitor. You talk about shifting ground. Maybe I changed positions in two years, but he changes positions in two minutes.

Mr. Brown: I have a right to put in this evidence as rebuttal because of what Shenton said, and the fact that I

have a right to put it in as rebuttal when it bears on issues against both defendants allows me [206] to put it in against both, so far as I know, and not against one only.

The reason, your Honor, that I point out this situation on the interrogatories at this time is simply that until your Honor makes the mistake of saying that the plaintiff has the burden of proving the negative, that is, that we have the burden of proving the invalidity of their affirmative defense — until you make that error, the lack of evidence, if there is any, as to what NANA did is not my problem, it's Mr. Millimet's, and that was Mr. Millimet's problem during the preparation stage of this case, and we were prevented from getting any better evidence than we're offering on this score by order of this Court because Mr. Millimet took the position that this was part of his affirmative defense. Now, I think the fact of the matter is, your Honor, that your Honor's indication that you were [207] thinking that the entire burden in this entire area would be cast upon the plaintiff — talking in advance of a ruling on it — may have prompted Mr. Millimet to take the dangerous course and not bring in any justification, excuse evidence with regard to what the client NANA actually did in this instance. Now, obviously, under the circumstances, he'd only make his own case worse because there's nothing they could have done which would avoid the reckless disregard. That's the basic reason he decided to do it. He's not relying on the Court's preliminary suggestion as to where the burden of proof is going to rest at all. He's tried too many cases to do that.

Mr. Millimet: The burden of proof on the privilege under the constitutional rule is on the plaintiff, and we've known it all along. There's never been any question about it. It said so right in the cases. [208] On other aspects of

defense there may be a burden of proof on the defendant, but on that issue, which is the issue that we're talking about on the nonsuit, the burden of proof is on the plaintiff.

Mr. Brown: I'd be interested — what aspect of the defense do you say you have any burden on? You said there may be some aspect. Tell the Court on which aspect you think you have the burden.

Mr. Millimet: I don't say I have any. I say there may be some. You have taken the position, not I, that we have the burden of proving truth.

Mr. Brown: That is correct. You've alleged it and you have the burden.

Mr. Millimet: That's been your position.

Mr. Brown: You have alleged privilege, and you have the burden of proving privilege.

Mr. Millimet: I disagree with you. The burden of proving privilege, that there is a privilege — I don't know. I thought that was agreed on. But the burden of [209] proving the falsity and the knowledge of the defendant as to the falsity is on the plaintiff, and that's what we are talking about. In any event, I think we're a long way off from this point, the point that I thought that we were going to discuss.

The Court: I didn't think we were going to discuss it. I was going to show you that and say I was going to be consistent.

Mr. Millimet: And I was going to object.

The Court: I'll note your exception, and I will note his exception, too.

Mr. Millimet: You're going to permit him to go into the same matter you permitted with Blalock?

The Court: Yes. If he wants to go further, you have a right to make an objection and to except.

Mr. Millimet: All right, your Honor. While we're in here, I might as well —

Mr. Brown: We're going to be going over exhibits for identification at some time. Can't [210] we close the evidence?

Mr. Millimet: You don't mind if I hold off on these exhibits?

Mr. Brown: Look, I have reached and, I think, passed the state of mental exhaustion, and I would like, if it were possible, to stop the arguments and get the evidence closed if it can be done.

Mr. Millimet: All right. I just thought you were going to make me pass on these before you closed your evidence. If you want me to say it after you close the evidence —

Mr. Brown: I propose to close my evidence the same way you do, reserving the right with respect to exhibits.

Mr. Millimet: All right. Subject to the exhibits.

Before The Jury

Mr. Brown: I don't think I completed the question. If I may start another — ?

The Court: Yes.

Q. Mr. Zwicker, before I ask you these other few questions I have, tell me, sir, what educational training do you bring [211] to your profession as a journalist? A. I attended the University of Maine, majored in journalism.

Q. And am I correct that your adult life, your work has been in the field of journalism since then? A. That's right.

Q. Mr. Zwicker, just a couple of things I'd like to ask you about. As a newspaperman, generally, do you think you know generally what newspaper editors' duties are with respect to reporting facts, generally? A. Yes. I think I do.

Q. And what, Mr. Zwicker, are your journalist's duties

so far as reporting facts? What generally is the situation?

Mr. Millimet: If the Court please, note my objection as not bearing on this case here.

The Court: Your exception may be noted.

A. I'm not sure I understand what you mean.

Q. Well, with regard to proposed facts, you recognize there's a difference between truth and falsity? A. Yes. Except there are times when there's some question.

Q. All right. With regard to truth and falsity, as a journalist, do you have any duties to not publish one or the other? A. So far as I'm concerned, we have a duty to publish the [212] facts.

Q. What about falsity? A. We certainly don't have any duty to publish falsehoods.

Q. Let me ask you directly, sir: If a piece came in to a newspaper desk for possible publication saying, just as a for-instance, that Lyndon Baines Johnson was a shoplifter, what would you do?

Mr. Millimet: I object to this, your Honor, to Lyndon Baines Johnson being a shoplifter.

The Court: I will sustain the objection.

Mr. Brown: Exception.

The Court: Exception noted.

Q. [By Mr. Brown] If it were a statement that Dwight Eisenhower was a shoplifter —

Mr. Millimet: Well, your Honor, I object. There's no — I object.

Mr. Brown: I'm sorry. I thought the objection was I mentioned the President.

Mr. Millimet: I have just as much respect for a Republican President as I do for a Democratic one, Mr. Brown. That's not the basis of my objection, and I think you know it.

[213] The Court: Sustained.

Mr. Brown: Exception.

The Court: Exception noted.

Q. [By Mr. Brown] Leaving the names out, sir, if a report came to you, or to a newspaperman in your situation, naming an individual and saying that the individual was a shoplifter, would you print it?

Mr. Millimet: I object, your Honor.

The Court: Not what he would do.

Mr. Millimet: Not only that, your Honor, but he's just picking out an individual now. This is a different situation, if the Court please. I think he shouldn't talk in personalities. This is not germane to what the issue of law is in this case, and I object to it. I object to the whole question. He knows how to ask the question. It's been done before, your Honor.

Mr. Brown: I desire to press the question, your Honor. The objection previously was that I was naming an individual. I have taken the individual out.

[214] The Court: I guess he wants it a public official or a candidate.

Mr. Brown: All right. Sure.

Q. [By Mr. Brown] Mr. Zwicker, let's assume that the fellow we're talking about is running for a major political office and somebody brings in something, purposing to have it published, to a newspaper fellow in the type of situation that you're familiar with saying that that fellow is a shoplifter. What do you do so far as publishing is concerned?

Mr. Millimet: Not what he does, your Honor.

Q. What would a newspaperman in this vicinity — what would you do? Not you individually but somebody in your capacity.

Mr. Millimet: My exception, your Honor.

The Court: Exception noted. If you understand the question, sir, you may answer. Not what you would do but what newspaper publishers generally in the area would do.

Mr. Millimet: I object on the grounds that it doesn't in-

form the witness so that he has any information about the man in question.

The Court: What do you say?

[215] Mr. Brown: May I have the question answered?

The Court: Very well. Your exception may be noted.

Mr. Millimet: Thank you.

Mr. Brown: Do you have the question in mind, Mr. Zwicker?

The Witness: Well, I'm not sure exactly where we stand right now.

Mr. Brown: Well, the Court has ruled that you may answer. Now, do you still recall what I am — ?

The Witness: Sure.

Q. What would you do? A. The first thing I would do is try to ascertain to my own satisfaction whether this were true, whether the person, the official or whatever, were indeed a shoplifter. I wouldn't print it unless I could be sure that he was.

Q. And is that —

Mr. Millimet: Note my exception, your Honor, as not being a statement of the test of the law.

The Court: Not what this witness would do, Mr. Brown.

Q. Mr. Zwicker, is that, in your opinion, what newspapermen in your position would do?

[216] Mr. Millimet: Well, I object. Leading, of course.

The Court: Exception noted.

A. That's the common practice with most newspapermen.

Q. Generally, sir, when you don't know whether it's true or false, what do you do before you publish — generally?

A. I determine to my own satisfaction if it's true or false; and if it's false, or there's reason to doubt its truth, I wouldn't print it.

Q. And that generally is what newspaper people do?

Mr. Millimet: I object, your Honor, to the last answer and ask it be stricken.

Mr. Brown: Your Honor, I asked the question generally. I think the witness intended to answer it generally, but he is answering in the first person, which I think is perfectly normal. In my pending question I just want to be sure that he is still telling us what in his opinion the general practice is.

The Court: Well, if it's the general practice, he may answer. Why don't you clear it up with the witness, Mr. Brown?

Q. [By Mr. Brown] You have just told us in first-person [217] language, Mr. Zwicker, the answer to that question. Let me ask you, sir, is that, in your opinion, what newspaper publishers generally — or newspaper editors — would do under those circumstances? A. Well, I answered in the first person because I could speak only for myself.

The Court: Then it may be stricken.

Q. [By Mr. Brown] Do you know, sir, what — A. This is the general practice.

Q. But this is the general practice? A. So far as I know.

Mr. Brown: Now may the witness's answer that the Court just ordered stricken be reinstated?

The Court: All right. It may be reinstated. Your exception may be noted.

Mr. Brown: You may inquire.

Cross Examination

[By Mr. Millimet]

XQ. Mr. Brown asked you before once, I think, Mr. Zwicker, whether you published this column and you said you didn't? A. That's true.

XQ. As I understand it, you didn't have any information

as to the truth or falsity of this column one way or the other; [218] is that the situation? A. That's right.

XQ. And I understand — am I correct in my understanding also that the gentleman in question, Mr. Roy, was not known in your county and you didn't want to go to the trouble of checking up on it and that's why you didn't publish it? A. That's right.

* * *

[1] Tuesday, December 20, 1966
2:45 p.m.

In Chambers

[48] MR. MILLIMET: Throughout this case there's been constant discussion about whose malice is involved here, your Honor, and Mr. Brown, in his opening, took the position that the leadership of the Democratic Party, including me and various other people who were involved and working in the party at the time, were malicious toward Alphonse Roy; [49] and I have understood from previous preliminary discussions that the Court is disposed to rule that for the purposes of liability and for the purposes of damages the malice of any person whose activities, as being newsworthy, were the subject matter of the column and of the other press reports, could not be received as bearing on the malice of either of the two defendants; and I so move, that the evidence be limited in that respect; and I think that the record will show that we preserved our rights at the time it was offered. We raised this issue all along, and I think the Court said this should be taken up at the end, and that's what I'm trying to do at this time, your Honor.

MR. BROWN: Well, if it please the Court, I

object to there being any change in the status of evidence as a result of post-trial motions of this nature. The extent to [50] which the activities of any individuals are chargeable to any of the defendants is in part a matter of argument based upon what the evidence is and in part a matter of law; and this question comes up appropriately when we get — if we ever do get to that point — when we get to the point of discussing instructions to the jury.

* * *

[51] THE COURT: Well, I'm not going to change the status of the evidence, if that's what you say; but do you say the defendants are chargeable with malice that other people might have toward the plaintiff?

MR. BROWN: Well, your Honor, if you want to start at this point discussing what the appropriate instructions are —

THE COURT: No. I don't, necessarily.

MR. BROWN: Our position is roughly this: The malice that we're talking about here is the publication of what is obviously defamatory material, and the malice is, [52] generally, whether it was published knowing that it was false or with a reckless disregard for whether it was true or false. Our position, basically, is this: That where it is obvious that it's defamatory, if no action is done at all, if the defendant does nothing except publish, that that in and of itself is reckless disregard. Our next position is this: That if either of the defendants did any checking at all, a cursory check would have disclosed that the defamation was false; and the only source that NANA suggests that it would have made a check was with Pearson, so that if we assume that NANA's conduct —

* * *

[53] If NANA's conduct involved checking with Pear-

son, then obviously, from Pearson they can not get any information that would remove their subsequent publication from being reckless disregard because Pearson had no justification for what he published — I'm talking primarily but not entirely to the bootlegging charge, because the same situation exists with respect to the suggestion that Sullivan was a straw. That was a known falsehood. And if NANA asked Pearson, "What is your judgment?" Pearson's answer, on this record, had to be, "Some fellow by the name of Scott, whom I have never met but who answered the telephone, told me, and I don't know anything beyond that except that he is working [54] for the political opponents of Mr. Roy; but knowing no more than that, publish it." Now, if they published on no more than that, on the basis of Baer and Rosenblatt, that conduct, the extent of the investigation that brings the article up to the point of being published, that has a bearing on NANA's conduct in letting it go.

THE COURT: Excuse me. I guess I didn't understand what Joe — and I don't particularly understand you. I mean from where I sit, I'm going to rule that each defendant is responsible for its officers and employees, their conduct. I don't think that NANA is responsible — or that any malice by anyone other than its employees or its officers or agents is imputable to them.

MR. BROWN: Well, your Honor, I dislike to indicate I think the Court is wrong even when I think the Court is wrong.

THE COURT: I know you don't agree with that, Stanley.

[55] MR. Brown: But this matter comes up more appropriately when we get to the instructions; and when we get to the instructions, those things that bear

upon their conduct I think the Court should actually consider in the light of the decided cases.

THE COURT: I haven't seen your requests yet.

MR. BROWN: I appreciate that; and that's why I say that these statements before as to what the Court's inclination is it seems to me are prejudicial to the Court as well as prejudicial to us; and I think that all that my brother is attempting to get, to do, is get the Court into a position of pre-judging what the appropriate law is before we get to the point of submitting it in detail.

MR. MILLIMET: I have a motion, your Honor, pertaining now to the liability of NANA. As I understand it, on the state of the record at the present time, the Court [56] has ruled that NANA cannot be liable on any issue except the bootlegging issue. Both my brother Brown and I think the Court is wrong about this ruling. I think the Court is in error for permitting the bootlegger issue to go to the jury as against NANA; but as I recall the record, the Court reserved the right to reconsider on that issue at the close of all the evidence, and I submit herewith a memorandum in support of our motion for a nonsuit and now, of course, a directed verdict, as against NANA, on the entire case.

MR. BROWN: May it please the Court, before we have any discussion on this, I would like to request the Court take out of the file the interrogatories addressed to NANA, the defendants' motion in regard to them and the Court's ruling upon them, because I think that this has a material bearing upon the suggestions in this memorandum that I think are [57] entirely contrary to the law of this case, the law of libel, and the Supreme Court cases that have any relevance.

* * *

MR. BROWN: I think it does. The situation to which I am attempting to invite the Court's attention

is this: The defendant, moving to be excused from answering interrogatories, by Paragraph 1 of that motion says that Questions 1, 2, 3, 4, 5, 6, 7 and 8 all require the defendant to disclose the names of witnesses by whom or the manner in which it proposes to prove its case and is therefore not available to the plaintiff because of the prohibitions of RSA 516:23. You then go to the interrogatories that they say are part [58] of their case and we're not entitled to have, and Paragraph 7 is: "State what investigation, if any, was made by Monitor-Patriot Company to determine the truth of the matters discussed in the column in issue in this case."

Paragraph 8 is:

"State the names and addresses of persons who reviewed the column initially on behalf of the Monitor-Patriot to determine its suitability for publication."

Now, in the ones against NANA, which I hope are the ones I gave you, the same requests for information were asked of NANA, and NANA similarly took the position that these were matters which were privileged against discovery by the plaintiff because of the prohibitions of 516:23 because these are matters which the defendant relies upon to prove its case. This situation [59] resulted in some orders in November of 1965, your Honor. To that date, the defendants were proceeding, and the Court was proceeding, upon the basis that having pleaded the affirmative defenses of truth, justification and privilege, in the Monitor's case, and defending under the general issue in the NANA case, that both defendants were taking it upon themselves to produce evidence on this point. I think I am correct that until your Honor indicated that you preliminarily purposed to place the entire burden of disproving the defense of privilege upon the plaintiff, that everybody

concerned was assuming that the rule was, as I think it actually is, that this defense, being an affirmative defense, the burden is on the defendants. Now, in that posture of the case, I don't think that the burden of proof should be entirely on the plaintiff. I have never [60] agreed that this is a correct view of the law, although I have acknowledged that if that is the way your Honor ends up on it, there's not much I can do about it in this court; but the suggestion that we have not come forward with evidence that they told the Court was in their case and they refused to make available to us because of that situation as late as November, 1965, to charge us at this point with failure to prove — to disprove their defense, I say is not only wrong under the law, it's wrong, procedurally, and it deprives the plaintiff of a fair trial. This was a position that was argued to the Court long after all of the cases my brothers are now talking about, United States Supreme Court cases, were made known; and the question as to who has the burden of proof as to what the defendants did, these being matters peculiarly within their own knowledge, [61] NANA being beyond the jurisdiction of the state, the suggestion that I have the obligation to disprove their defense, that is, as to their own conduct, I think is so far-fetched as to be entirely without merit. This goes back, your Honor, to what we were previously discussing. The conduct of NANA must be viewed in view of all the circumstances surrounding their handling of the Pearson column, and it is not a rule of law, there is no rule of law at all that Drew Pearson, as a matter of law, is a reliable source.

MR. MILLIMET: We're getting off the point, your Honor.

MR. BROWN: I don't think I'm off the point, and if I may for just a moment —

MR. MILLIMET: You interrupted me before I could even argue my motion, and I'd like to answer the point that he's talking about, the interrogatories, your Honor, and I think I should be entitled to.

Obviously, the motion to be excused from [62] answering the interrogatories had no reference whatsoever as who had the substantive burden of proof in proving actual malice in a libel case. It had reference to the statute which prohibits the plaintiff from probing into the defendant's information. It's the same in an automobile case or any other kind of a tort case. The burden of proof is always on the plaintiff to prove the liability in its case, and yet the statute prohibits it from getting the names of people whom the defendant knows. This doesn't relieve him of his substantive law requirement of proving whatever the substantive law requires; and this idea that my brother is now raising he's raising only because he neglected to produce any evidence against NANA, and he knows we're entitled to a nonsuit on that.

MR. BROWN: That's not so and you know it, and there's no particular point in your [63] making ridiculous statements like that on the record.

MR. MILLIMET: He just makes this now for the first time. As I said before, if he wanted to take any depositions of NANA, he knew how to do it. If he wanted to move for additional discovery, he knew how to do it. If he wanted to raise this issue of who had the burden of proof on this question of not having to open your files to the other party, he knew how to do it; and this has nothing to do with the substantive motion that we make for a ruling as to NANA. This is a procedural matter.

MR. BROWN: The file would indicate that we have been relentlessly pursuing efforts to get at evidence in

this case, and not until we finally got the order of Judge Dunfey — we tried this by interrogatories, we tried it by discovery, we tried it by deposition, we tried it every way that there was; and the defendant [64] insisted that these were matters of defense and we weren't entitled to the information and we never got it.

MR. MILLIMET: You've got the information that you were entitled to.

MR. BROWN: We finally were told the names of three persons who were sources to Pearson, and we got that information in May, took the depositions —

MR. MILLIMET: In October. Let it go all summer. Never pursued the other question. I don't think he can say now this shifts the burden of proof on substantive law, your Honor.

MR. BROWN: It isn't a matter of shifting the burden. The burden of proof on substantive law in the State of New Hampshire has always been on the defendant, and there is not one word in any United States Supreme Court decision indicating a shift in the burden of proof. It's a situation which is the result of affirmative obligations on the defendant and [65] similarly affirmative obligations on the plaintiff; but the suggestion that we have the obligation to prove the negative, that we have the obligation to prove what they did in the face of this Court's refusal to let us get that information upon the representations of the defendant that it was part of the defense, puts us in an impossible situation, solely, I think, because of your Honor's thinking that somehow or other we have all the burden. I don't think we have all the burden. We may have the burden of putting substantial evidence in the case that the matters that we charge were false were false. I think we have the obligation of putting in, so far as we

can get it, the evidence that if any investigation at all had been undertaken, the falsity would have been apparent. Those things we have done. So far as we have been able to bring witnesses before the [66] Court we have attempted to bring in the total picture of what was not done; but this is placing on us the burden of disproving a defense, and the thing that's — as I say, if we took this up as part of the instructions, I think your Honor would recognize that there is a little bit more to these cases than merely to say there was a campaign for the United States Senate on and therefore the plaintiff has no rights unless the plaintiff assumes all the burdens in the case and satisfies all of those burdens beyond a reasonable doubt. That is not the law, and once we get to the requests, I think perhaps we will be able to satisfy the Court that that is so.

• • •

[78] MR. BROWN: If it please the Court, may I point out what some of the evidence is that my brother would like to disregard? Talking to NANA only, my brother takes [79] the position that NANA is a distributor of some non-liability mail. The fact that NANA sends this column to some 500 newspapers is publishing, is publication in and of itself. It's not a distributor in the sense that it has no responsibility for its actions. It is publishing when it sends the column to 500 newspapers. It not only is publishing 500 copies, it is publishing those 500 copies well knowing that what is in the column may come to the attention of as many as fifteen to thirty million people. Now, that is the position that they contracted to assume and take. Now, in that position, in that position, it is relevant as bearing upon their conduct that NANA contracted away its right to investi-

gate or to stop the distribution of the column, and that is in evidence, that they must publish if Pearson wants them to, that they [80] have abrogated, that they've abandoned any duty on their own part. They have tied their own hands by contract. Now, the reason they've done it, your Honor, while it's not before the jury is before the Court. The reason they've done it is twofold. One is they are joint venturers, at least, with Pearson financially, and so that they have a financial interest in letting it go; and the second reason is that Pearson agrees to indemnify them, which permits them to be reckless and to disregard truth and falsity because the financial burden of being wrong is assumed by Pearson and not by them, and that is a relevant consideration with regard to their contract. Now, the evidence is, in addition to that, that they make no independent investigation. Now, here's what I mean. Your Honor, I think, has been impressed — and I think unduly so [81] — by the argument that the Concord Monitor could do something about this. They were here and NANA is in New York. The telephone works just as well from New York as it does from Concord, and all these people in New York had to do to find out that this charge of bootlegging — talking the easy one — all they had to do to find out that was not a defamation that should be published, that it was probably false, was to pick up the telephone and call the police authorities here the same way, the same way that the fellow in Portsmouth did, and the same telephone would get them the same information.

MR. MILLIMET: There's no evidence of that.

MR. BROWN: They cut themselves off from making any independent investigation, and they did it by contract under these circumstances, and the evidence is that the most they would do if they did anything was to check it back with [82] Pearson, their partner, the

fellow who will absolve them from financial difficulty if they're wrong. Now, the evidence also is that they are people who recognize libel well, so well that they have a legal staff constantly available to go over these problems. That in some indication that they foreseeably knew that in this column from time to time libel is apt to appear; and the suggested evidence at Page 3 of my brother's motion that they talk back and forth with Pearson, that they try to straighten these things out by talking to Pearson, is all evidence, it's all evidence that would permit a jury to find that NANA did have some knowledge that this was defamatory and was reckless in letting it go without doing any more than talking with Pearson. The Keogh case rule that my brothers have urged upon you relentlessly — they're talking about a case where [83] there was no evidence with regard to Pearson, that there was merely an affidavit. We have placed before the jury what Pearson did in this case, and with that evidence in this case as to the extent to which he investigates before he writes the publication, this jury is in just as good a position as anyone else to determine whether reliance upon Pearson is a reliance that takes the case out of reckless disregard; and if they find — and I think they have a right to find — if they find that Pearson recklessly writes, without regard, with reckless disregard for whether what he writes is true or false, they can, with that knowledge, judge NANA's conduct in relying upon no one except Pearson and come to the conclusion, on the evidence, that such a reliance by NANA is reckless disregard. What it comes to, I think, is the difficulty of proving that someone is [84] in reckless disregard when they do nothing. Now, the evidence actually is, the actual evidence is that both of these defendants did nothing, exercised no judgment, and merely threw this out to the

general public. That is a complete absence of exercising any care. That is reckless. That is indifference. That is the failure — to do nothing is a total failure to act, and that must be, that must be at least the equivalent of a reckless disregard for whether it's true or false. We have the old case of Derby and the Electric Company, I think it is, where the lady slipped on the floor —

MR. MILLIMET: "Derry", isn't it?

MR. BROWN: "Derry" and the Gas Company — some such case — in which the Court indicated that the lady at least did something. There was evidence that she did do something — talking to a nonsuit [85] — and therefore she wasn't to be nonsuited on the basis of taking no care at all. Taking no care at all is reckless disregard; and when we get to the point, if it please the Court, when we get to the point of what the correct instructions are as to what is and what is not reckless, these elements of evidence which are in the case, under the law, are sufficient evidence of reckless disregard for truth or falsity and I think may also rise under the circumstances of this case to being the publication of falsehood knowing that it's false. Now, the reason I say that is another aspect of this same thing. Although Mr. Millimet and Mr. Scott both denied it, denied that they did — let's put it this way —

MR. MILLIMET: Now we're going to go back two steps behind NANA, three steps behind NANA.

MR. BROWN: Mr. Pearson's file indicated that before he published criminality with [86] respect to the other three individuals, he had the criminal record of these people submitted to him so that he had some justification for what he was writing; and he had a total absence of anything at all with regard to the bootlegging, with regard to Roy. Now, that is a factual situa-

tion which, if NANA did what NANA says they would have done if they did anything, places NANA in a position of asking Pearson, so far as Roy is concerned, "What backing is there for this?" and the answer would be, "None, except a fellow by the name of Scott, whom I never met, and I don't know whether he's a nut or whether he's reliable. All I know is he answered the telephone and he told me these things." NANA is relying upon Pearson alone in this fashion, and Pearson being in that situation factually in this case is evidence that NANA's conduct in this case is reckless disregard for whether [87] it's true or false; and I don't think that the defendant can say that on the evidence they did nothing and still —

MR. MILLIMET: We don't say that.

MR. BROWN: But that is what the evidence is. The evidence is, from Pearson, that if they did anything at all they would have checked with him, and nothing more, and that's Hoff's testimony that that's all they did, and NANA contractually disenabled itself from performing any such duty; and under the circumstances, I think the jury is entitled to find that relying upon that contract, relying upon that contract and being financially irresponsible, they sent it out to publication with reckless disregard for whether it was true or false; and it being a corporation, I don't know how, beyond that, the situation could be demonstrated in any event. Consider, for example, if anybody came up to say [88] anything to the contrary, what would they have said? Hoff and Pearson already have told the Court and jury what the situation was. Unless this Court is prepared to say as a matter of law that relying upon Drew Pearson is a complete defense, is a complete defense, that anybody can come in and say, "We relied on Drew Pearson without regard to anything more,"

that that is evidence of conduct that is other than reckless disregard when Pearson has no knowledge to back up his claim — unless the Court goes that far, the case is for the jury.

MR. MILLIMET: Well, if the Court please, I'd like to say several things. It cannot be evidence of recklessness that somebody has an indemnity contract, which is an essential part of my brother's argument. He keeps coming back to that point. He says in light of this contract it's available for this jury to find reckless disregard. Now, the contract [89] is not before the jury. It's not proper for it to be before the jury. And the existence or non-existence of the indemnity contract cannot be used to supply the evidence of reckless disregard, as my brother keeps insisting that's what he's going to do. So that already, under the law of the trial as the Court has made it, the point that he's relying on isn't available to the jury. There's no issue for the jury because it lacks what he says he needs to prove his case; and there's no rule of law anywhere that the existence of an indemnity contract increases anybody's duty. Even in a question of negligence, the existence of an insurance contract, for example, doesn't have any bearing on the conduct of the defendant, and this is the same situation. My brother keeps assuming a conclusion all the time. He keeps saying that all the time they did nothing, they are [90] utterly indifferent, they pay no attention to anything. That isn't the evidence. He keeps saying that, but that doesn't make it so, your Honor, and it isn't so on the record, and in the Times case this very issue came up and got decided.

MR. BROWN: It did not.

MR. MILLIMET: Excuse me. I agree that this issue of the indemnity didn't get decided. That, I think, is an issue of simple, ordinary tort law that we can

decide without any reference to libel law. The existence of an indemnity contract doesn't change anybody's burden of due care or, in the absence of an indemnity contract, doesn't change anybody's burden of due care.

MR. BROWN: That's exactly what I've argued, Mr. Millimet.

MR. MILLIMET: Well, whatever you've argued, you've argued. The rest of his argument is that if they had checked with Pearson, [91] Pearson would have reassured them that he had evidence that this fellow was a bootlegger and they couldn't rely on Pearson. Your Honor, they could rely on Pearson. It's not true that they have to go behind Pearson. They did not have to go behind Pearson. Perhaps they can not rely on Pearson without doing anything about it. They can't just ignore everything and just send everything out willy nilly and then say, "We didn't do anything and therefore we're immune from responsibility," but that isn't what this case shows, your Honor. There is no evidence that that's what they did. And they didn't do that. And as a matter of law, they don't have to go behind Pearson. In the Keogh case they didn't have to go behind Pearson. In the Times case, talking about biased sources, for example — my brother says, "Well, if they'd asked Pearson, they would have found out that [92] the source of Pearson's information was biased." Your Honor, you heard Mr. Pearson's testimony. You heard Mr. Scott testify. This wasn't just an ordinary witness that gave this information to Pearson. Mr. Scott didn't just casually tell this to Mr. Pearson. He described the situation to Mr. Pearson, and Mr. Pearson testified that he was very persuasive; and if the NANA people had talked with Pearson, he would have said the man was very persuasive, and it doesn't matter that he was a biased source. It doesn't matter

that he was a biased source, your Honor. In the Times case the source was even more biased, and it was held that they couldn't be found to have reckless disregard even though they could have found that the answer was untrue in their own files. This case is far better for the defendant than the Times case, and we say that as a [93] matter of law the plaintiff has failed in his burden of proof as against NANA, not as against Concord Monitor. It's a separate issue. And we also say here—reading here from the Connor case, New York Times against Connor, 365 Federal 2nd at Page 576: "While verification of the facts remains an important reporting standard — " now, they're talking about a reporter — "a reporter, without a high degree of awareness of their probable falsity, may rely on statements made by a single source, even though they reflect only one side of the story, without fear of libel prosecution by a public official." Now, if the Court please, my brother, in his argument and throughout the time we've been arguing about this point, is adopting a view which as a matter of law is untrue and which I'm sure we're entitled to an instruction on. He seems to assume throughout his [94] argument that unless a person has proof that a man has been tried and convicted of engaging in illicit liquor traffic, he can't believe that a man has been a bootlegger. Well, it's perfectly apparent throughout the record of this case that that isn't so. That isn't even so as a matter of common sense, much less than as a matter of proving reckless disregard of the truth; and there's no law which requires a person to have that kind of evidence, and there's no law which says that if NANA had inquired of Pearson and he had told them his source of evidence that they would be in reckless disregard. If they had said to Pearson, "Are you satisfied from your investigation that this is

probably true?" and Pearson said to them, "Yes," that would have been, as a matter of law, enough to excuse them from reckless disregard, and there's no evidence that that didn't [95] occur. In fact, there's every belief that that did occur.

MR. BROWN: Your Honor, all of these United States cases my brother is talking about are discussing factual situations. The case that he talks about with Salisbury has in it the fact that Salisbury, the reporter, did make effect to get the countervailing point of view, and the evidence in this case is that Pearson made no such effort. Now, that in and of itself, that in and of itself distinguishes this case from the one involving Salisbury. The Times and Sullivan case is entirely different than this because what the Court said in that case was that the 25 or 30 sponsors of the advertisement were people of such well known responsibilities that the Times was entitled in their advertising department to accept the fact if so many responsible people sponsored the ad that they could perhaps [96] rely upon the responsibility of those people and had no obligation to go back to their own file to find some per quod indications that what was said in the ad was perhaps to a degree false. In these other cases, they stand and fall, I think, on their own facts; and the point toward which my brother is urging the Court to go I am satisfied is error because he is asking the Court to rule as a matter of law that reliance upon Drew Pearson, whatever the circumstances may be, is a complete defense to a claim that they published in utter disregard, reckless disregard for truth or falsity. To take an example, if Pearson said that Lyndon Baines Johnson was a shoplifter — the same example, I attempted to use before the jury — the same defense that my brother has suggested

is made available. Does that end the case? I don't think it does. These things are all matters to be decided by the [97] jury as to whether or not what was done constituted any action or whether they merely published in reckless disregard. Now, the situation in which both defendants actually stand the same in is that both defendants did precisely the same thing. The Concord Monitor didn't check, and in spite of what Shenton says, I think it was demonstrated in cross examination that he was making it up. He had a cock-and-bull story about the column already being set up on an automatic tape, and in connection with all of that he recalled that he had read it and, you know, it didn't appear to him to be unusual. As it turned out, it didn't turn out that way at all. The jury doesn't have to believe it at all. The fact is that they did the same thing that NANA did, merely put it out without being concerned with truth or falsity. Now, that is utter disregard.

[98] THE COURT: I guess we better take a recess. It's apparent if I'm to pay any attention at all to your requests we're not going to be able to argue and charge tomorrow morning.

(Discussion off the record)

THE COURT: I will deny the motion for nonsuit as to NANA, and I will note your exception.

MR. MILLIMET: Well, if the Court please —

MR. BROWN: That was nonsuit and directed verdict both that he made.

THE COURT: Well, all right. I'll deny your motion for a directed verdict.

MR. MILLIMET: I take it, your Honor, that the only issue open against NANA is the bootlegger issue?

THE COURT: That's correct. Although he may make some motion —

MR. MILLIMET: Don't you think we better settle NANA before we go on with Concord Monitor?

THE COURT: I'm not going to require him to make a motion.

MR. MILLIMET: My exception to your Honor's rulings.

[99] AFTER RECESS

MR. MILLIMET: The defendant Concord Monitor moves for a nonsuit and a directed verdict as to the count concerning the publication calling the plaintiff a former small-time bootlegger. I want to take that up separately, if I may. We feel that the Concord Monitor, your Honor, is in a different position from NANA on this issue of whether or not, under the constitutional rule, they can be found guilty of reckless disregard on the question of publishing reference to the fact the plaintiff was a former small-time bootlegger. The Concord Monitor had special knowledge to the effect that the plaintiff was a former small-time bootlegger. When the column came to the attention of the Concord Monitor, it came to the attention of the city editor, Enoch Shenton. Enoch Shenton testified that [100] he had heard the common report that Roy was a former bootlegger as early as, I think the evidence is, 1933 when he was first brought in contact with Roy as a member of the Governor's Council.

* * *

[116] MR. BROWN: May I just say shortly in response, the whole argument comes down to a suggestion by Mr. Millimet that the [117] jury must necessarily believe Shenton, and Shenton's credibility is open. The jury doesn't have to believe a word he said, and he's the only one who claims to have this special knowledge; and the curious thing about his testimony

is that he made no claim of knowing any rumors in Manchester. His claim was that he heard it in the State House while Bridges was Governor; and it was known at that time, as he testified, not only that Alphonse had been a bootlegger but he was still a bootlegger; and the other source that gave him this information was A. B. Jenks, in the 1940's.

MR. MILLIMET: And Bridges' secretary.

MR. BROWN: And Bridges' secretary. And Bridges, curiously enough, wasn't Governor until after Prohibition was already repealed, so this suggestion he was bootlegging is one more tidbit as to how accurate Mr. Shenton is and how credible his [118] story will be to the jury. This is a jury issue, your Honor.

THE COURT: I'll deny the motion.

MR. MILLIMET: Subject to our exception.

I don't think we need to argue the motion on the other two counts, do we, your Honor? I don't suppose you're going to be more persuaded on those counts than on this one.

* * *

[122] CHARGE TO THE JURY

MORRIS, J.: Mr. Foreman and members of the jury, I want to join with counsel in thanking you for your courteous attention which you have paid throughout the trial to the evidence and to the arguments of counsel, and I appreciate that. I also want to join with Mr. Brown in hoping that I give you a clear instruction of the law that you will follow in the case.

I suppose that your task that you will be setting out on shortly can be likened to a journey which you are going to take. The goal, or the end of your journey, is a verdict either for the plaintiff or for the defendants, that is, in ac-

cordance with the law and the evidence; and whether or not you reach the right goal or the end of your journey will depend upon the signposts that you follow along the way. If I should give you the wrong marking, the wrong direction, you would end up at a wrong goal. So I agree it is important that I advise you correctly.

Mr. Roy, the plaintiff here, he comes into court, he asks that you give him a verdict for money damages. He says that the defendants have published defamatory words about him, that they had no legal right to do this, that he has been damaged; and he asks you to give him those damages. Of course, the defendants deny that they used defamatory words about him. They have answered. They have made an answer in this case. They agree [123] they published the column on the date in question — I believe it was September 10, 1960 — and they also agree that certain of the words that were used in the column were concerning the plaintiff, Alphonse Roy. They deny that the words that they used were defamatory.

So that the first issue, the first signpost that you have is, were defamatory words used in the article about the plaintiff? There is no question but what the plaintiff was identified. That is not an issue. But it is whether or not the words were defamatory.

Well, I will help you with the first signpost. The word "bootlegger" describes a criminal offense, and that is defamatory in and of itself, so that you do not need to, as to that particular part of the column, you do not need to be concerned with that. That I give you, that you are to consider that, in deciding the case, as being defamatory.

Now, as to the other parts of the article which the plaintiff claims were defamatory and which the defendants deny were defamatory, the words used are ambiguous, that is, they do not in and of themselves impart — or they do not in and of themselves defame the plaintiff.

Now, where words are ambiguous, that is, the meaning is not clear, it is for you to decide whether or not those words are defamatory. If you decide the words are [124] not defamatory, then as to those words you are no longer concerned with them because that is what the case is about, defamatory words. If there are no defamatory words other than the word I have told you is defamatory — "bootlegger" — if you find there are no others, then you would not any longer be concerned with those in this case.

Also, as a part of defamatory words, the defendant must have intended the defamatory meaning, the readers of the publication must have understood them to be defamatory. If the readers did not understand them to be defamatory, or if they were not used in a defamatory sense, then you will find them not defamatory.

So that the first thing that you are concerned with is what in the article concerning the plaintiff — not other parties other than the plaintiff, but concerning the plaintiff — what was defamatory? If you decide that nothing besides the word "bootlegger", about which I have advised you, is defamatory, you disregard the rest of it. If you decide there were other defamatory matters intended by the defendant in the defamatory sense and understood by the readers in the defamatory sense, then you would consider them. That is, that would be one of the guideposts to the continuance of your journey.

Now, there is a difference in the law in regard to [125] individuals who are not in the class of public officials. That is, private individuals or public officials, there is at the present time a difference in what you may publish concerning them, and there is a difference in the rules as to whether or not what you publish is actionable.

Where defamatory matter is published about a public official in criticism of his official conduct, that is, a public official and his official conduct as distinguished from his

private conduct, the public official may recover money damages for a libel — that is, defamatory words that are published about him — only if he establishes that the utterance was false, that it was made with knowledge of its falsity or with a reckless disregard of whether it was false or true.

Now, in this case, the plaintiff, Alphonse Roy, at the time of the publication was a candidate for the United States Senate, as we all know, and as such I instruct you that he comes within the public official rule. That is, he may recover for a defamatory publication relating to his official conduct only if he establishes that the utterance was false and that it was made with a knowledge of its falsity or with reckless disregard of whether it was false or true.

Now, the claimed defamatory publication relating to the causing of straw candidates to file and to the cooperation with [126] the opposite political party, that is, as put in the words of the plaintiff, inducing Frank L. Sullivan to file as a straw or fraudulent candidate and improperly cooperating with and assisting a Republican candidate for the same office, Styles Bridges, those two items, the straw candidate and the item I just read to you, they come within the term "official conduct". That is, Mr. Roy is a public official, and those charges concerning him come within his official conduct, so that you have the guidepost to continue your journey in regard to those matters.

I instruct you that as to those two matters, that is, the causing or inducing Frank L. Sullivan to file as a candidate in 1960 as a straw and the improper and unethical cooperation, or the claimed improper and unethical cooperation with the Republican candidate, Styles Bridges, that is not a part of the case against, as counsel say, NANA — North American Newspaper Association. The only part of the charge that you are concerned with in regard to NANA up to this stage of your journey is the charge in regard to a bootlegger. All three of the allegations by the plaintiff you are still

concerned with in regard to the defendant Monitor Company. The publication that the plaintiff Alphonse Roy was a former small-time bootlegger, as I say, is the only part of the case still in regard to the defendant NANA, and, of course, it is also a part of the case against the Monitor-Patriot Company.

[127] As to this part of the publication, there is an issue of fact for you to decide. Your determination of this issue of fact will decide where you go in regard to the law as I give it to you: Is it more probable than otherwise that the publication that the plaintiff was a former small-time bootlegger was a public affair on a par with official conduct of public officials?

As a candidate for the United States Senate, the plaintiff was within the public official concept, and a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office. That is, anything which might touch on Alphonse Roy's fitness for the office of United States Senator would come within the concept of official conduct. If it would not touch upon or be relevant to his fitness for the office for which he was a candidate but was rather a bringing forward of the plaintiff's long forgotten misconduct in which the public had no interest, then it would be a private matter in the private sector.

That is, I say that this is a question of fact for you to decide on the evidence in the case. The plaintiff has the burden of proving that it is in the private sector.

Now, burden of proof, I have discussed it with you, I believe, some of you at least, in other cases; and, of course, you were given general instructions about it. I will need to [128] tell you again, though, in regard to the issues in the case, if a party has the burden of proof, then he sustains the burden of proof if it is a little more probable than otherwise on the evidence in the case that his claims are true.

That is to say, if in considering the evidence — and the evidence in this case is what the witnesses said and the exhibits — if you are unable to determine one way or the other in regard to a particular issue, that is, you couldn't determine that it was more probable than otherwise in the defendants' favor or more probable than otherwise in the plaintiff's favor, then if it is about a matter in which the plaintiff has the burden of proof, then having failed to tip the scales in his favor, he would have failed in the burden of proof. It is a matter about which the defendant has the burden of proof and the scales do not tip one way or the other, then, of course, the defendant has failed in the burden of proof. Of course, if on the evidence it is more probable than otherwise in favor of the opposite party, of course the person having the burden of proof has not sustained the burden of proof.

It must appear a little more probable than otherwise that the plaintiff's claims are true if he is to have sustained the burden of proof. If he does not sustain the burden of proof, you decide the issue against him. The same thing would apply to the defendants where they have the burden of proof.

[129] No property in witnesses. It doesn't make any difference whether the evidence is produced by the plaintiff or by the defendants. Consider all of the testimony in the case in regard to all of the issues in the case.

The fact that the plaintiff brought the action, this doesn't mean he is entitled to recover. He is only entitled to recover if on all the evidence you decide there is liability in accordance with the evidence and the law. The bringing of the action is merely the means of getting it into court for your decision.

Because a witness was allowed to testify doesn't mean that you have to accept what he says. It is entirely up to you

what you accept and what you reject. You are the sole arbiters of the evidence.

During the course of the trial, the Court has made some rulings of law, that you were entitled to hear or not hear certain evidence, and that's all they have been, merely rulings of law. It was not an attempt to indicate to you how you should decide the case. You decide the case on the testimony of the witnesses which you accept and according to the weight that you give to it and not because you think I want you to decide one way or the other. I don't. I am absolutely impartial. The only thing I want you to do — and I'm sure that counsel join with me in this — is that you decide the case according to the [130] evidence and according to the law which I give to you.

You can accept or reject the testimony of a witness. Use your best judgment, your common sense. Consider their appearance on the stand, their manner of testifying, what they had to say, the probability of what they said being true as compared with what other persons said — anything that would help you to decide in the manner in which you are required to do, as a jury sitting on serious affairs, as to what evidence you should accept and what weight you should give to it. If you don't accept it, disregard it. If I have ruled that it is admissible on one issue but not generally, then consider it on that issue.

To get back —well , I guess I ought to say a little more on burden of proof.

The plaintiff, having brought the action, he has the overall burden of proof. It becomes important on — it is important throughout the case, but it is particularly important if it is an issue where you are unable to decide on the probabilities. That is, what we are dealing with is probabilities. I will attempt to indicate to you where the plaintiff has the burden of proof and where the defendants have the burden of proof, having in mind that all of the evidence

bears on each issue and the burden of proof has been sustained by the party when it appears from all the evidence just a little more probable than otherwise.

[131] I believe I left you with the issue of whether or not the bootlegger charge was a public affair relating to official conduct of a public official. That is, a candidate, as we say, he must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office. Anything which might touch on his fitness for the office would come within the concept of official conduct. If it would not touch on it or be relevant to it, in matters in which the public has no interest, I mean no official conduct but rather a bringing forward of the plaintiff's forgotten misconduct, then it would be a private defamation. If you find that this bootlegger matter was a public affair which should be brought to the attention of the public in that it might affect his official acts, then that is the end of the case in regard to NANA. That is, that's your milepost.

There are two cases here. The plaintiff has an action against NANA, as you know, and seeks to recover money damages. He has an action against the Monitor Publishing Company and seeks to recover money damages from them. They are corporations. Of course, a corporation is a being for purposes of a suit being brought. A corporation acts through its officers and employees and agents; and in regard to the deciding of this case, the defendant corporations, the acts of the employees and officers of the defendant corporations, either NANA or the Monitor-Patriot [132] Company, are the acts of the corporation and you will regard them as such.

The defendants are not responsible for the actions of other persons other than its officers and its employees, but they are responsible for their actions.

Now, if you find that the "bootlegger" is a public mat

ter, then that would be the end of the case in regard to the defendant NANA. You would bring in — you will have verdict blanks. I will get to those later — but you would bring in a verdict for the defendant NANA on that basis.

If you decide that it is a public matter, it would still be a part of the case against the Monitor-Patriot Company as the two other claims relating to straw candidates are still a part of the Monitor-Patriot case.

Now, here the road on which you reach the end of your journey divides. You can't travel merely by one road. You have to travel by two, depending upon your decision. If you decide that the "bootlegger" is a private matter, not related to official conduct, the claim against NANA is still for you to consider; and I will instruct you, or attempt to be clear as to the law in regard to that. If you decide it is a public matter, I will instruct you as to the law as it applies to the Monitor-Patriot Company, as to that claim, and also as to the road you must travel in regard to deciding the claims [133] in regard to the other two matters.

Now, let's assume that you have decided that it is only a public matter. Mr. Roy is a public official, and having decided it is a public matter, there is no suit left against the NANA corporation, and you have the issue of liability in regard to the Monitor-Patriot Company. Now, what are your guideposts in regard to liability as to a public matter where you have a public official as you do with Mr. Roy in this case? The plaintiff, that is, the public official, seeking to recover for defamation in regard to public affairs, or his conduct of public affairs, he can recover only if you find on all the evidence that the charge was false — that is, that would apply to the "bootlegger" and the "straws" and the other claims of the plaintiff — that the charges were false, that the defendant Monitor-Patriot Company knew it, knew they were false, or published them with a reckless disregard for their truth or falsity.

Now, I will explain those a little bit later, but that's if you decide it is a public matter.

If you find it was not a public affair, then in that case, as to that part of the publication — that is, that the plaintiff was a former small-time bootlegger — the defendant Monitor and the defendant NANA would be liable to the plaintiff unless they, [134] the defendants, established that the publication was justified or that they published it under a conditional privilege. That is, in regard to private defamation there is a difference in the burden of proof, that is, as to who has the burden of proof. There is a difference in the type of issue from public matter. If you decide that it is all public matter, then you would not be concerned with the private defamation at law, the law in regard to proving it. If you decide that it is a private defamation, the bootlegger charge, then you would be concerned with both, proof by the plaintiff in the public sector and proof by the defendant of justification or a conditional privilege.

Under the public sector, the plaintiff must prove that the publication was false. He has the burden of proof there, to show it more probably than otherwise was false. He must prove that the defendants knew it was false, more probably than otherwise knew it was false, or that the defendants published it with a reckless disregard for whether it was true or false.

As to the private segment, the bootlegger charge, the publication has been admitted by the defendants, that is, that the column was published, and so that is no problem for you. You can accept it. The plaintiff was identified. There is no problem of identification. I have instructed you that if the charge is a criminal offense, it is defamatory in and of itself, [135] so that you do not have the issue whether it is defamatory.

Now, that being the state of the case, if you have decided that it is a private defamation, the plaintiff would be en-

titled to recover, that is, you would bring in a verdict for the plaintiff in regard to the private defamation unless the defendants — and the evidence applies to each one of them, all of the evidence in the case — unless it is more probable than otherwise that the publication of the defamatory matter was justified or that it was conditionally privileged.

Now, justification is established — and the defendants have the burden of proof, if you are in the private sector, on justification — is established if the facts stated are true and are published with a justifiable motive. That is, there are two issues there: First, whether the published matter is true, and, secondly, whether it is published from a justifiable motive, that is, to give to persons entitled to know the information so that they can act upon it.

Now, assume that you find as a fact that it is not true so that the defendants cannot justify it — that is, you must find it is more probable than otherwise that it is true, and the defendants here in this sector would have the burden of proof, in order to justify it, to show they published it from a justifiable motive.

[136] Now, assume that you find that it is more probable than otherwise that it is not true or on the evidence you are unable to decide whether it was or not. Then the defendants cannot justify it because it is not true, or you're not able to determine. They may nevertheless publish it if they can establish that they have a conditional privilege.

Now, by this I mean an absolute privilege is testimony in court or statements made on the floor of the legislature. I mean those are absolute privileges. The defendants here, they claim that even if you find it was a private defamation, even if you find that it was untrue, that they nevertheless had a conditional privilege to publish it. That is for you to decide on the evidence.

When is a conditional privilege established? Well, it is established if the facts, although untrue, were published on

a lawful occasion, in good faith, for a justifiable purpose, and with a belief founded on reasonable grounds of the truth of the matter published.

A communication is privileged in the public interest when it is published with good motive based on probable grounds of its truth.

You have those two issues. I mean that issue is a preliminary matter to decide. Is this a private defamation or [137] is it in the public sector? If in the public sector, verdict for the defendant NANA, and you go on to the evidence relating to whether or not it is false. That is, the plaintiff must prove that it is false and the defendant knew it was false or that he published it with a reckless disregard for truth or falsity.

If you decide it is in the private sector, both of the legal roads or issues must be followed by you. That is, the plaintiff, in the private defamation, is entitled to recover for the injury done to him unless the defendants establish justification — justification if the matter was true and published for a justifiable purpose. If untrue, they may not justify it, but they may prove a conditional privilege if it was published on a lawful occasion, in good faith, for a justifiable purpose, and with a belief founded on reasonable grounds that the matter was true.

In regard to the public sector, the plaintiff's burden of proof — falsity, knowledge of the falsity, or reckless disregard of truth or falsity. Reckless in the sense — I would suppose it could be said to be a wanton act, if that would help you, or it could be a state of mind accompanying an act where the actor either paid no regard to its probable harm or injurious consequences or, though foreseeing such consequences, persisted in spite of this knowledge.

[138] I guess I will move on, or try to. I will restate the claims that the plaintiff is making here.

The plaintiff claims that the Pearson column in ques-

tion made three defamatory charges against him: that he was a former small-time bootlegger, that is, at one time he had engaged in the business of selling, transporting or manufacturing alcoholic liquor in violation of the laws of New Hampshire and the United States.

That's a claim of the plaintiff. It is for you to say what the evidence is in this case.

The second claim is that he caused or induced Frank L. Sullivan to file as a candidate in 1960 for the Democratic nomination for the United States Senate as a straw or fraudulent candidate for the purpose of improving the plaintiff's chances of winning that nomination.

The third claim of the plaintiff relates to the charge that in causing or inducing Frank L. Sullivan to file as a straw or fraudulent candidate, the plaintiff was improperly and unethically cooperating with and assisting a Republican candidate for the same office, Styles Bridges.

I've told you before that the Pearson column clearly identifies the plaintiff, Alphonse Roy, in this case. There is no question of identity. Of course, there are other matters in [139] the column which do not refer to the plaintiff. The plaintiff is not entitled to recover except for matters which you decide are defamatory and relate to him. He is to recover for those according to the law as I give it to you.

Under the First and Fourteenth Amendments to the United States Constitution, you can not award damages to a candidate for public office even for a defamatory falsehood relating to his qualifications for said office unless the candidate proves actual malice in the sense that the falsehood was published with knowledge of its falsity or with reckless disregard of whether it was true or false.

The publication in such a case may give rise to a privilege, qualified to this extent: that is, anyone claiming to be defamed by the communication which is in the public sector must show actual malice or go remediless. This privilege

extends to a great variety of subjects and includes matters of public concern, public men and candidates for office. That's in the public sector.

Also in the public sector, where an article is published and circulated among the voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without malice, the [140] article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff. In such a case, the burden is on the plaintiff to show that the article is false, that the defendant knew it was false or published it with a reckless disregard for its truth or falsity.

The defendant Monitor had a right to publish fair comment on the qualifications of the plaintiff as a candidate for the United States Senate, and the political activities of the plaintiff in connection with this campaign were a matter of fair comment.

In the public sector, of course, as I said, if you find that the defendant's publications were substantially true, your verdict must be for the defendant Monitor. If you're in the public sector, that is, if you decide the "bootlegger" was a public matter about which the public had a right to be informed, you are not concerned with NANA, and your verdict would be for the Monitor.

A man may be a bootlegger even though he has never been convicted as such or even though no charges were ever brought against him by the police. A man may be a bootlegger who was engaged in any way in illicit liquor traffic. One who aids or abets another in the sale or transportation of liquor can be said [141] to be a bootlegger.

In the public sector, on September 10, 1960, Alphonse Roy was both a public figure and a candidate for high public

office. Because of his special position, the law of libel has limited application to him. That is, the limited application is as I have given it to you, as to what the plaintiff must prove in order to recover.

The principles of the Constitution pertaining to free speech prevent either defendant from being held for damages in this case unless the plaintiff Alphonse Roy proves that each defendant either knew the statements were false or that each defendant made the statements with reckless indifference to whether they were true or false.

Well, I've said before that if you were to decide that no other part of the column was defamatory of the plaintiff, you wouldn't be concerned with the other two parts of it. You would only be concerned with the "bootlegger" part, which I have instructed you about previously. One of the first things you do is to decide whether or not it is defamatory. Now, where — I'm restating, I guess — where the words are ambiguous, the fact for you to decide is whether it is defamatory; and to be defamatory, it must have been intended as such by the user, by the person who published it, and it must be understood as such by the reader.

[142] Now, a statement about a person is defamatory if it tends to harm the reputation of that person so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. A statement is defamatory if it directly or indirectly charges a person with a crime, or if it tends to expose him to public hatred, contempt or ridicule, or if it charges him with conduct incompatible with the proper discharge of his duties as a public official or as a candidate for public office.

A defamatory publication may consist solely of a statement of fact, it may consist solely of a statement of opinion based upon assumed facts, and it may consist both of statements of fact and statements of opinion base upon the assumed facts stated in the publication or other assumed facts.

The truth or falsity of a defamatory statement of fact is a question of fact, provable as such.

In the public sector, the plaintiff has the burden of proof in regard to the truth or falsity. In the private sector, as to a private defamation, the defendant, in regard to justification — that is, he may justify it if he proves it is more probable than otherwise that it's true and that he published it on a justifiable occasion.

The propriety of the opinion, as fair comment thereon, is [143] a matter of judgment.

A defamatory publication may be made by derogatory adjectives or epithets as well as by statements of fact. Thus, it is defamatory to add to an accurate statement of another's innocent conduct adjectives or epithets which characterize it as reprehensible.

The Pearson column published as a fact that plaintiff was a former small-time bootlegger. A bootlegger, in common understanding, is one who sold or dealt in alcoholic liquor during Prohibition, at which time such conduct was a misdemeanor under state law and might be either a misdemeanor or a felony under federal law. A charge that one was a bootlegger is therefore a charge of crime and is defamatory.

National Prohibition went into effect on January 16, 1920, and was repealed on December 5, 1933. Here in New Hampshire, liquor control legislation, generally as we now have it, was enacted at a special session of the legislature on June 4, 1934. Thus, the period of Prohibition and bootlegging was the period 1920 to 1934, generally.

Of course, a publication may be defamatory on its face, as I've told you in regard to bootlegging, or it may carry a defamatory meaning only by reason of extrinsic circumstances. In the latter case, the plaintiff has the burden of pleading and [144] proving such facts. Likewise, he must es-

tablish the defamatory sense of the publication with reference to such facts.

Much of the testimony in this case was in regard to circumstances so that you would have a setting, a frame in which to work in regard to the determination of whether matter published here was defamatory, or not, of the plaintiff.

In regard to the plaintiff's claims that the Pearson column in question charges, or insinuates, that he induced Sullivan to file as a straw and that in so doing he was cooperating with Senator Bridges, of course, you decide whether the column in question was intended by the defendant in the defamatory sense and was understood by the readers to have the meaning ascribed to it by the plaintiff, that is, in a defamatory sense; and also decide, in addition to whether it was so intended or whether it was so read, also decide whether or not it is defamatory.

In determining what meaning was understood by the readers of the column, you should consider the testimony of the persons who read the column. That is, their testimony would not be relevant to how it was intended by the defendant, but it would be relevant as to how it was understood. Of course, you can consider the evidence of statements made by others about the column, the testimony of the witness Pearson as to his intended meaning, and all evidence as to the circumstances existing at [145] and before the publication of the column.

In considering whether or not the defendant's writing is defamatory, the words used in the article are to be considered together with their context and must be taken in the sense in which they are reasonably understood under the circumstances by persons familiar with the language used. That is, to render a defamatory statement actionable, it is not necessary that the charge be made in a direct, positive and open manner. If the words used, when taken in their

ordinary sense, convey a degrading imputation, no matter how indirectly, they are defamatory, and it matters not how artfully their meaning is concealed or disguised. A mere insinuation is as actionable as a positive assertion if the meaning is plain.

The fact that the Ballot Law Commission made the decision it did with regard to the candidate Sullivan does not require that you accept its decision. If you decide that the column in question charged that Frank Sullivan was a straw, you must decide for yourself, in the light of the evidence before you, whether he was in fact a straw candidate and give the decision of the Commission only such weight as you think proper.

One who publishes and disseminates matter defamatory of another which was originally uttered by a third person is liable as though the dissemination were an original publication by him, [146] if he has reason to know of its defamatory character. That is, the defendants are not relieved of liability by proving that someone else originated the statements which they published. The defendants are liable when, on the evidence and on the law as I've given it to you, they publish a defamatory article and — this is in the private sector — it is not justified or proved to be published under a conditional privilege; and in the public sector when the plaintiff has proved that it was false and that the defendants either knew it was false or published it with a reckless disregard of truth or falsity.

Proof that the statement was made by another person does not thereby relieve the defendant from liability, and, of course, neither does it make him liable unless it meets all the tests. He is liable if it is a defamation and it meets the tests as I have given them to you for libel.

The conductor of a public press has the same rights to publish information that others have, and no more. News syndicates and newspapers have no peculiar rights or spe-

cial privileges or claims to indulgence. They may circulate and publish the truth but have no right maliciously to publish a falsehood to the injury of others. The case of a conductor of a public press does not come within the class of persons absolutely privileged in their communications. There is no right [147] in news syndicates or newspaper publishers more than others to do wrong, and they are not justified because they did not write the article or did not know the plaintiff. That does not disprove malice but often aggravates it by showing a wantonness and indifference whether it be true or false. The liberty of the press is not endangered by the punishment of malicious libelous publications.

Of course, with reference to justification, I said there must be a lawful occasion for making the publication. If the end to be attained by the publication is justifiable, that is, to give useful information to those who have a right and ought to know in order that they may act upon such information, the occasion is lawful. Where, however, there is merely the color of a lawful occasion and the defendant, instead of acting in good faith, assumes to act for some justifiable end merely as a pretence to publish and circulate defamatory matter, or for other unlawful purpose, he is liable in the same manner as if such pretence had not been resorted to.

In determining whether or not the conduct of the defendant amounted to reckless disregard — that is, the defendant Monitor Publishing Company — amounted to reckless disregard of whether the statement in the column was true or false, you have in mind, of course, what I told you about reckless disregard previously. [148] You will also consider the character of the statements made, whether or not they could be recognized to be dafamatory, what investigation the defendant Monitor made to determine the truth of the statements or the sources of that information, what information the defendant Monitor, or its employees, had

about the matters stated in the column, the nature of that information, what they would have learned had they done any investigation, or what they learned from whatever investigation you find the evidence may show.

The defendants claim that in publishing this column they relied on Mr. Pearson. You may consider to what extent the defendants relied on Mr. Pearson. Of course, the defendants are liable for what they did, that is, their conduct. That is, assume that you find on the evidence, in the public sector, that more probably than otherwise this matter of a bootlegger and in regard to straws was false. Then it's the defendants, what they did. What is the evidence as to what they did in regard to their knowledge of the falsity or the reckless disregard of whether it was true or false, not what somebody else did. And, of course, all of the evidence in the case as it may be relevant to this reckless disregard should be considered by you on that issue in regard to the suit against the Monitor Publishing Company. There is no [149] issue in the public sector in regard to the North American — or NANA, so-called.

Of course, if you decide the bootlegger charge was private and not something of public interest, you would be concerned with the acts of North American Newspaper Alliance, what they did themselves in regard to this matter. Different rules apply in that case, in the private sector. That is, you would be concerned with their conduct; and in deciding whether their conduct amounted to reckless disregard, or malice, as I've defined it to you, in regard to the bootlegger charge, you may consider whether or not reliance upon the sources of information which Mr. Pearson had — that is, whatever that would indicate or prove in regard to the acts of the defendant NANA.

It is not sufficient to prove malice that the statements made in the publication of September 10, 1960 were made negligently. In the public sector, they must have been made

either with knowledge that they were false or with a reckless disregard of their truth or falsity.

Malice cannot be imputed from a source of information to the defendants. You cannot find the defendants, or either of them, responsible in damages merely because of any ill will, prejudice, recklessness with the truth or unfairness on the part of any person in the case that there has been evidence about [150] except the duly authorized agents or employees of the respective defendants. Drew Pearson is not an agent for either defendant.

The publication of September 10, 1960 was not made recklessly unless it was made with a high degree of awareness of its probable falsity. Of course, in regard to the private sector, you would be concerned with conditional privilege, and I have discussed that matter with you.

There has been evidence regarding rumors that the plaintiff was a bootlegger. It is a question of fact for you to find whether or not these rumors existed. If you find they did exist, they are not to be considered by you as any evidence of the truth of the charge that the plaintiff was a bootlegger. Rumors are admitted in evidence to mitigate damages and as they bear on the malice of the defendants; and to this extent only, and for this purpose only, will you consider them. If you find the rumors to have existed, they can be considered by you as bearing upon the conduct of the defendants, or either of them, to the extent that they, or either of them, were aware of the rumors when they circulated the Pearson column in 1960.

Evidence of rumors that the plaintiff had been a bootlegger may be considered by you as one factor in determining whether the conduct of the defendants was malicious if, but only if, you find that such rumors were known to the defendants at [151] the time of publication of the column in question, and you should give such weight to the evidence as

you may see fit considering the character and source of the rumors.

With reference to the defendants' claim that they were publishing a repetition of a common report, if you find that such was the case, you may consider that and give it such weight as you determine is proper in mitigation of damages or as bearing on the presence or absence of actual malice. Whether the publications were or were not mere repetitions of common report is for you to decide on the evidence. If you find they were not, you will give this matter no further consideration. If you find they were, you may consider that fact as it may bear on damages or malice.

One who falsely, and without a privilege to do so, publishes matter defamatory to another is liable to the other even though no special harm or loss of reputation results.

There is no evidence in the case from which you can find that NANA was activated by personal ill will or personal animosity toward the plaintiff.

There is no evidence in the case from which you can find that the Concord Monitor was activated by personal ill will or personal animosity toward the plaintiff.

Statements honestly believed by the defendants are to be [152] protected and privileged. The reasonable belief standard is not the same as the reckless disregard of truth standard. The test of the reckless disregard of truth standard is not conditioned on mere negligence.

I've mentioned ordinary care. Reckless disregard is not the negligence which is considered in other cases. Negligence, as you will recall, is the failure to do something, or doing something different from what the ordinary person of average prudence would do under the same or similar circumstances. Recklessness, in this sense, is much more than ordinary negligence.

Your first task is to decide if there is liability. If you decide that there is liability, then you would go on to the issue of damages. If you decide that there is no liability as

to the defendant NANA or as to the defendant Monitor-Patriot Company, then, of course, you would not be concerned with damages. If you decide there is liability, you are concerned with damages.

Broadly stated, the plaintiff is entitled to recover such damages as are the natural and direct or proximate result of the publication.

If you find that the defamatory publication charged the plaintiff with a crime or with activities which would tend to injure him in his trade or business, commonly called libel per se, [153] he can recover as general damages all damages which would normally result from such a defamation, such as harm to his reputation. He need not prove these damages specially.

Now, in addition to general damages, that is, if it is a defamatory publication and you find there is liability on the part of either one or both defendants, the plaintiff is entitled to recover such special damages as he has proved has resulted and will result in the future as a natural and proximate consequence of the defendant's defamatory act. These would include specific harm to his personal reputation in addition to the general harm which would be assumed to result from the libel, harm to his business reputation, loss of income, and any other damage which you find he has proved resulted as a normal and direct consequence of the defamation.

General damages are imposed for the purpose of compensating the plaintiff for the harm which the defamatory publication is proved, or, in the absence of proof, is assumed to have caused to his reputation. It is not necessary for the plaintiff to prove any specific harm to his reputation or any other loss caused thereby. That is, if he proves any special damages, then he'd be entitled to them; but he'd be entitled to general damages without proof. There are general damages and special damages, which are the ones I previously read to you, the ones [154] that he alleges to have proved.

In determining the amount of an award of general damages, you may consider the character of the plaintiff and his general standing and reputation in the community as affecting the loss which he has probably sustained or will sustain. You may also consider the character of the defamatory publication and the probable effect of the language used as well as the effect which it is proved to have had. You may consider the area of dissemination and the extent and duration of the discussion of the article. To the extent the plaintiff was engaged in a trade or business, such fact may also be considered in the estimation of the harm which may have been sustained by him as a result of the defamation.

General damages may be awarded for future harm which it is reasonably assumed may come to the plaintiff as well as for harm which his reputation is assumed already to have sustained.

One who is liable for a libel is also liable for any special harm of which the defamatory publication is the legal cause, and is liable also for emotional distress and bodily harm resulting therefrom which is proved to have been caused by the defamatory publication or, in the absence of such proof, for such emotional distress as normally results from such a publication.

[155] You must consider the state of the plaintiff's reputation before and after the alleged libel in this case. If you find that the state of the plaintiff's reputation was such that the publication of this column did not lessen his reputation, you may award the plaintiff only nominal damages in this case.

In considering the damage to the plaintiff's reputation, you may consider the extent of the circulation of the column in question only in those areas where the plaintiff is known. The law does not permit the plaintiff to recover damages for loss of reputation in those areas where he is not known and therefore has no reputation.

The fact that damages for loss of income are difficult

of accurate determination does not prevent recovery for them. Publication of this writing in newspapers of wide circulation provoking discussion in the area is evidence from which you can find that the defamatory statements have probably come to the attention of prospective real estate customers of the plaintiff. If you find that the article by its nature had a tendency to injure plaintiff's real estate business and that this injury resulted from the publication in whole or in part, you may consider this fact in arriving at your award.

Of course, as to each element of damage claimed the plaintiff has the burden of proof. That is, he has the burden [156] of proving that it is more probable than otherwise that he sustained the special damages which he alleges and claims.

There is a more liberal rule of damages when there is found to be malice. This applies both in the private sector and in the public sector.

Actions of defamation are designed not only to furnish some indemnity, so far as money can do it, for the injury inflicted, but to vindicate the character of the person unjustly assailed, and to protect him or her against a repetition of the wrong or outrage. The question is not only what is proper for the injured party to receive for the wrong done him but what it may be just, under all the circumstances, that the wrongdoer should be required to pay.

Juries may rightfully award more severe damages for the willful, designed, malicious and mischievous circulation of a story known to be false and repeated with a design to injure.

If the evidence satisfies you that the words set forth were published maliciously, that is, knowing that they were false, or with reckless disregard for whether they were true or false, you are at liberty to give severer damages for the

deeper malice and malignity of heart and mind attending the publication of the libel.

If you find there is liability, you get into the question [157] of damages. The rule of damages is different in a libel case and more liberal than in other cases on which you have sat. In such cases there enter into the question of damages consideration which cannot be made the subject of exact pecuniary compensation, such as mental distress and vexation, what in common language might be talked about as offenses to the feelings, insult, degradation, offenses against honest pride, and all matters which do not arise except in those wrongs which are attended with malice. You should endeavor, according to your best judgment, if you find there is liability, to award such damages by way of compensation or indemnity as the plaintiff on the whole ought to receive and the defendant ought to pay.

The plaintiff cannot recover for publicity arising out of this trial. Since he brought the lawsuit, the defendants are entitled to defend the claims and produce such evidence as bears on the issues involved. The press has a right to report the evidence introduced in court.

You cannot find the defendant responsible in damages for mere criticism of him in respect to political activities, even if the remarks against him were caustic and unfair or unpleasantly sharp or nasty in their implications.

There is no evidence in the case that the plaintiff lost any financial credit as a result of the publication of this [158] column. Of course, that is taken from your consideration. It's not an issue.

You are not to consider Mr. Roy's loss of the United States Senate primary in 1960 or his 1963 race for Mayor as an element of damage for which he is entitled to compensation in the case. That is, you are not to consider damages, if you reach that point, for the loss of an election.

Of course, it's not the concern of the defendants and

you cannot find either defendant responsible in damages because the Democratic state committee said Mr. Roy was unqualified for office or unworthy of support.

You cannot find either defendant responsible in damages in this case for anything done or said at the ballot law proceedings by anyone.

The defendant Monitor-Patriot Company, if you find they are liable, they are responsible only for the damages which resulted from the Monitor-Patriot Company's publication of the libel in the Concord Monitor and the resultant discussion of the charges that you find that publication caused.

The defendant North American Newspaper Alliance, if you find that they are liable — that is, if bootlegging is in the private sector and the test for liability is met — then the North American Newspaper Alliance is responsible for all damages [159] resulting from its circulation of the column to the newspapers which published the article, including the Concord Monitor. In assessing damages against the defendant NANA, that is, if you reach that point, you must consider only damages resulting from the charge that the plaintiff was a former small-time bootlegger.

To be sure there is no duplication of damages, that is, the plaintiff will not be allowed to recover twice — and the Court will take care of that — you will bring in a full and complete verdict against the Monitor Publishing Company for the damages which you find are caused by the publication of the article in their paper, if such you find. You will bring in a full and complete verdict against NANA, if you find they're liable in the private sector, including the publication in the newspapers of the defendant Monitor Publishing Company. But to be sure there is no duplication of damages, you will have a special question to answer in the action against the Monitor-Patriot Company, if you find both defendants liable, and that special question I will give to you

along with the verdict blanks. The question will ask you to report how much of the damages you assess to the Monitor as a result of the charge that Mr. Roy was a bootlegger.

When you go into the jury room — and I apologize for keeping you this long — you will have with you verdict blanks. [160] There are two verdict blanks. The verdict blanks are in two parts. There is a top half, known as the plaintiff's half, and there is the bottom half, known as the defendant's half. If your verdict is for the plaintiff, in one of the two or both of the two, you would use only the plaintiff's half of the verdict blank. If your verdict is for the defendant, you would use only the defendant's half.

You, Mr. Foreman, have the duty of writing in, in ink and not in pencil, and in words, not in figures, the amount of your verdict, if it is a plaintiff's verdict, and you will sign at the place indicated where the line says "Foreman". If your verdict is for the defendant, you don't use the top half. You, Mr. Foreman, merely sign at the place indicated.

You have two blanks. There are two cases here. Alphonse Roy against the Monitor-Patriot Company and Alphonse Roy against North American Newspaper Alliance, Inc., which has been referred to here as "NANA".

All twelve of you must agree on your verdict. You, Mr. Foreman, will vote along with the other persons; and in addition to their duties, you have the duty of seeing the deliberations are carried out. That is, you act as the presiding officer, and you vote along with the others, and then you also fill out the verdict blanks when you've reached your decision.

[161] In the verdict blank envelope there is also the special question which you are to answer, assuming that both defendants are in the case. If one defendant is out, then you don't need to answer the special question.

"In your verdict against the defendant Monitor-Patriot Company" — in the event you return a verdict for the plain-

tiff in that action — "how much did you include as representing damages resulting from publication of the bootlegger inference?"

And you would be required to fill that in in words and not in figures. Well, I see that blank indicates both for words and for figures. And then you would sign it, Mr. Foreman.

After you reach your verdicts and have completed the verdict blanks, please put them in the envelope, seal the envelope and return it to the Sheriff along with all the exhibits.

Thank you, very much for your careful attention.

* * *

[205] THE COURT: Good evening.

Mr. Foreman and members of the jury, I have your verdict blanks, and I appreciate that I am keeping you and that you have been working hard. I do not mean by calling you in to imply that there's anything wrong with the [206] verdicts you returned or the manner in which you filled out the verdict blanks. Because there are two defendants in the case and two verdict blanks, and also because of the special question that I asked you and gave you instructions about, I need to know the answer to a question, and the question is: What is the total amount of money that you intended by your verdicts that the plaintiff should receive?

If you, Mr. Foreman, could answer that question, I would appreciate it.

THE FOREMAN: The unanimous feeling of the jury was that each defendant was liable for $10,000.00, $20,000.00 total.

THE COURT: Say again, sir. The total was how much?

THE FOREMAN: $20,000.00.

THE COURT: Very well. You may be seated, sir, and thank you for answering the question.

* * *

EXHIBIT #1

D.C. MERRY-GO-ROUND
By Drew Pearson

Sept. 10, 1960

(EDITOR'S NOTE — While Drew Pearson is taking a short vacation, his column is being written by his associate, Jack Anderson.)

WASHINGTON — With the closing of Congress, most members paid their own fare home or charged it against the two trips they are authorized to take each fiscal year. But a privileged few wangled free transportation from the Air Force.

Those whose committees pass on Air Force legislation and appropriations seemed to have the least trouble finding planes going their way.

The worst offender is South Carolina's brooding, flowing-haired Congressman L. Mendel Rivers, a power on the House Armed Services committee, who seems to regard the Air Force as his private airline. He need only snap his fingers, and the Air Force starts warming up a plane to fly him to his home in Charleston, S.C.

More than once, he has been the sole passenger in a giant C-54 pressed into service as his flying taxi. Sometimes the Air Force even provides attractive WAF hostesses to wait on him.

During the past summer, he has taken only the Air Force flights to South Carolina: one to Charleston in a C-54, the other to Myrtle Beach in a C-47. What cut down on his commuting, however, was a trip to the Far East. He traveled on Air Force planes, of course.

Free List

Here are others who have tumbled free rides home:

Sen. Strom Thurmond, South Carolina Democrat, was

flown to Columbia, S. C., after the Senate adjourned. He had taken earlier trips to the West Coast and Georgia, allegedly on reservist matters.

Congressmen Robert Hamphill of South Carolina and John Flynt of Georgia, both Democrats, were also dropped off near their homes after adjournment.

Earlier, Congressmen O. C. Fisher, Clark Thompson, Jack Brooks, and Bob Casey, all Texas Democrats, flew to Texas in Air Force planes.

Congressman Charlie Diggs of Michigan and Leonard Wolf of Iowa, both Democrats, also caught free flights to their home states.

An Air Force C-54 dropped Senate Armed Services chairman Dick Russell off at his home in Winder, Ga.

New York's blueblood Congressman Stuyvesant Wainwright, Republican, saved the return fare from Bermuda by hitching a free ride with the Air Force.

Congressman Perkins Bass, New Hampshire Republican, caught an Air Force plane for the short hop from Washington to New York.

Political Snafu

Rock-ribbed Republican New Hampshire, whose ex-Gov. Sherman Adams was top kick in the White House for years and whose Sen. Styles Bridges is still top kick on the GOP side of the Senate, is so fouled up in a primary snafu that the state may go Democratic this year. The primary verdict is due next Tuesday.

Even that able Senate stalwart, Styles Bridges, is restirring himself. He has nothing to worry about from his Republican opponent, but the Democrats have put up a dynamic Dartmouth professor, Herbert Hill, against him. The professor came within 11,000 votes of defeating Sherman Adams, lately of vicuna-coat fame, in the 1948 gubernatorial race.

Curiously, the Democratic primary has been cluttered with a motley assortment of candidates who have challenged Hill for the privilege of running against Bridges. That sly, old Republican disclaims any connection with it, but he appears pleased over the muddying of Democratic waters.

One of Hill's primary opponents Frank L. Sullivan, was released from the Grasmere County Work Farm just in time to file for the Senate. With a police record of no fewer than 19 convictions for drunkenness since 1945, he was serving his latest 90-day sentence.

Curious Call

To make sure he would get out in time to run for the Senate, a former small-time bootlegger and later U. S. Marshal, Alphonse Roy, telephoned the Grasmere warden about Sullivan.

Ralph LaVallee in charge of Grasmere, admitted to this column that he had received a telephone inquiry from Roy as to whether Sullivan would be released in time to file. But the warden denied another report that Roy had announced he was calling "on behalf of my friend Styles."

"I don't want to get implicated in anything like that," said LaVallee. "Roy didn't mentioned Senator Bridges."

Sullivan happily got out of the workhouse in time to run for the most distinguished legislative body in the world. And who should turn up on the ballot but the same Al phone Roy who was so eager to get him out of the clink.

Because of the peculiar population division of New Hampshire, the Irish Catholics may be inclined to vote for a Frank Sullivan while the French Canadians could be attracted by a name like Alphonse Roy. The effect would be to cut down Herb Hill's chances.

Convicts For Senator

Two other curious candidates, who tried to run in the Democratic primary against Hill, were Harold P. McCarthy who has a record of nine convictions for drunkenness, assault, and brawling, and Clement P. Robinson Jr., who has a record of six brushes with the law for drunkenness and traffic violations. Robinson also received a 30-day suspended sentence for stealing two power lawnmowers and a conviction for the nonsupport of his wife and three children.

But at least Professor Hill managed to persuade the New Hampshire Ballot Law Commission into knocking McCarthy and Robinson off the ballot.

The bitterest primary battle, however, is between the two Republican gubernatorial candidates, Gov. Wesley Powell and ex-Gov. Hugh Gregg. Powell not only incurred the ire of Vice President Nixon last winter by riding in front of Nixon in the GOP parade through Manchester, but is also antagonizing staunch Republicans by throwing long-time GOP stalwarts out of state jobs in an attempt to build up a personal Powell machine.

Bernard L. Boutin, ex-Mayor of Laconia who is running for governor on the Democratic ticket, may emerge as the final victor after the smoke has settled.

[Superior Court]

[Title Omitted]

PLAINTIFF'S REQUESTED INSTRUCTION NO. 5

The Pearson column published as a fact that plaintiff was a former small time bootlegger. A bootlegger in com-

mon understanding is one who sold or dealt in alcoholic liquor during Prohibition, at which time such conduct was a misdemeanor under State law and might be either a misdemeanor or a felony under Federal law. A charge that one was a bootlegger is therefore a charge of crime and is defamatory.

N.H. Revised Statutes, 1926, Chap. 144;
27 U.S.C.A. Secs. 12, 46;
Restatement, Torts, Sec. 559

* * *

PLAINTIFF'S REQUESTED INSTRUCTION NO. 6

A publication may be defamatory on its face or it may carry a defamatory meaning only by reason of extrinsic circumstances. In the latter case the plaintiff has the burden of pleading and proving such facts. Likewise, he must establish the defamatory sense of the publication with reference to such facts.

(Based on *Chagnon* v. *Union-Leader Co.,* 103 N.H. 426 - at 434)

* * *

PLAINTIFF'S REQUESTED INSTRUCTION NO. 12

Insinuations may be as defamatory as direct assertion, and sometimes even more mischievous. The effect, the tendency of the language used, not its form, is the criterion. The libeler cannot defame and escape the consequences by any dexterity in style.

(Based on *State* v. *Norton,* 89 Me. 290, 36A 394)

* * *

PLAINTIFF'S REQUESTED INSTRUCTION NO. 16

Circulation of Libel Created by Third Person

One who publishes and disseminates matter defamatory of another which was originally uttered by a third person

is liable as though the dissemination were an original publication by him, if he has reason to know of its defamatory character.
(Based on Restatement, Torts, Sec. 581)

* * *

PLAINTIFF'S REQUESTED INSTRUCTION NO. 18

(On Truth as a Defense)

When one person repeats a defamatory statement which he attributes to some other person, it is not enough for the persons who repeat it to prove that the statement was made by the other person. He must prove the truth of the dafamatory charges which he has thus repeated.
Restatement, Torts, Sec. 582, comment d.

PLAINTIFF'S REQUESTED INSTRUCTION NO. 18A

When any person, and by this I intend to include news syndicates and newspaper publishers, publishes and disseminates matter obviously defamatory of another person, and this defamatory matter is written or originated by another whose basis for writing the defamatory material is unknown to the person to whom it is disseminated for publication, the publisher, if he publishes without independent verification of the defamatory matter, is chargeable, if the matter is false, with publishing falsehood with reckless disregard for its truth or falsehood. He may offer, as evidence to rebut his reckless disregard, any reliance he says he placed on the originator of the defamatory matter, but in such a situation, to evaluate such reliance on the author, you are entitled to consider and should consider the extent to which the author was justified in writing the matter, and whether the author wrote it knowing it was

probably false or with reckless disregard for whether it was true or false. Thus, in this case, insofar as either defendant published without independent verification of any obviously defamatory material in reliance upon Mr. Pearson as the author, their reliance on Pearson is to be evaluated by you on the basis of what Pearson did or did not do, what Pearson did or did not know, with regard to this article. If Pearson wrote the article and offered it for publication knowing it was probably false or with reckless disregard for whether it was true or false, those who published it relying solely on his investigation, stand in his shoes, and are chargeable with his malice, if you find it to have existed.

PLAINTIFF'S REQUESTED INSTRUCTION NO. 19

The conductor of a public press has the same rights to publish information that others have, and no more. News syndicates and newspapers have no peculiar rights or special privileges or claims to indulgence. They may circulate and publish the truth, but have no right maliciously to publish a falsehood to the injury of others. The case of a conductor of a public press does not come within the class of persons privileged in their communications. There is no right in news syndicates or newspaper publishers more than others to do wrong and they are not justified because they did not write the article, or did not know the plaintiff; that does not disprove malice, but often aggravates it by showing a wantonness and indifference whether it be true or false. The liberty of the press is not endangered by the punishment of malicious libelous publications.
Smart v. *Blanchard*, 42 N.H. 137, 151 (Shep.)
as modified by *Times* v. *Sul'ivan*

* * *

PLAINTIFF'S REQUESTED INSTRUCTION NO. 21

If you should find that the defendants cannot *justify* the publication because you find it to be untrue, they may

excuse it by showing it was privileged. A conditional privilege, which is what is claimed here, is established if the facts, although untrue, were published on a lawful occasion, in good faith, for a justifiable purpose, and with a belief of its truth.
(Based on *Chagnon* v. *Union-Leader Co.*, 103 N.H. 426-438)

I instruct you that a good faith publication of defamatory information about a candidate for public office is conditionally privileged, even if it is false, unless it is published with knowledge of its falsity or with reckless disregard for whether it is true or false. If you find that the publication was false, and that the defendants, or either of them, published it knowing that it was false or with reckless disregard for whether it was true or false, then the publication was malicious, and no privilege attaches to its publication, and defendants are liable for all damages the publication caused the plaintiff.
(*Times* v. *Sullivan*, if it applies)

PLAINTIFF'S REQUESTED INSTRUCTION NO. 22

"No one can justify or excuse the publication of matter tending to bring another into contempt or disgrace, without any lawful occasion for making such a publication.

"If the end to be attained by this publication is justifiable, as, generally, to give useful information to those who have a right and ought to know, in order that they may act upon such information, the occasion is lawful.

"Where, however, there is merely color of a lawful occasion, and the party, instead of acting in good faith, assumes to act for some justifiable end merely as a pretence to publish and circulate defamatory matter, or for other unlawful purpose, he is liable in the same manner as if such pretence had not been resorted to."
(*State* v. *Burnham*, 9 NH 34, at 41, 42)

* * *

PLAINTIFF'S REQUESTED INSTRUCTION NO. 24

In summary, our law, while giving no countenance to malicious defamation, protects all persons in publishing, upon lawful occasions, the truth from whatever motives, and what they have reason to believe the truth, if it is done with motives which will bear examination. But even truth is no justification or excuse, where the publication has been made without any necessity or fair occasion for it—made in the spirit of detraction, and not to subserve any justifiable purpose; and the law does not permit anyone, on any occasion, to publish falsehood maliciously.
(*State* v. *Burnham*, 9 N.H. 34, 46)

PLAINTIFF'S REQUESTED INSTRUCTION NO. 24-a

In this case the defendants claim that even if the statements concerning Mr. Roy in the Pearson column were false they were conditionally privileged as dealing with a matter of legitimate public interest, and that the defendants therefore are liable only if they published the article maliciously. With respect to the charge that the plaintiff was a bootlegger it is a question of fact for you to determine whether in 1960 the fact that the plaintiff had been a bootlegger during Prohibition (if true) was a matter of legitimate public interest and was published for the purpose of properly informing the voters, or whether the charge was published for the purpose of defaming Mr. Roy as an individual, and was not related to the legitimate interest in his candidacy in 1960 or his qualifications at that time. If you find that the charge was related to a purely private matter, then the defendants would be liable for the harm caused by publication of that charge without regard to whether the defendants published the column maliciously.

* * *

[Superior Court]

[Title Omitted]

DEFENDANT'S REQUEST FOR INSTRUCTION NO. 1

You are instructed, as a matter of law, that the article complained of is not libelous per se. The column on its face contains no clearly actionable statement.
Rosenblatt v. *Baer*, 383 U.S. 75 (1966).

DEFENDANT'S REQUEST FOR INSTRUCTION NO. 2

Malice means not only that each defendant acted out of ill will toward the plaintiff, but that each acted either with knowledge that the statements made were false or with reckless disregard of their truth or falsity.
Chagnon v. *Union-Leader Co.*, 103 N.H. 426, 438;
New York Times v. *Sullivan*, 376 U.S. 254, 279-280.

DEFENDANT'S REQUEST FOR INSTRUCTION NO. 3

On September 10, 1960, Alphonse Roy was both a public figure and a candidate for high public office. Because of his special position the law of libel has limited application to him. The great principles of the constitution pertaining to free speech prevent either defendant from being held for damages in this case unless Mr. Roy proves that each defendant either knew the statements were false or that each defendant made the statements with reckless indifference to whether they were true or false.

In addition, before Mr. Roy can recover in this case he must prove as to each defendant that the statements complained of were made with ill will, evil motive or intention to injure him.

The plaintiff has thus a double burden of proof; he must prove known falsity as above defined and ill will. These two elements must be found to coincide in each defendant for plaintiff to recover against each defendant.

* * *

DEFENDANT'S REQUEST FOR INSTRUCTION NO. 7

Malice in both senses I have heretofore explained to you cannot be imputed from a source of information to the defendant.

You cannot find either defendant responsible in damages in this case merely because of any ill will, prejudice, recklessness with the truth or unfairness on the part of any person except the duly authorized agents or employees of the respective defendants. Drew Pearson is not an agent of either defendant under this rule.

None of the persons who furnished information to Mr. Pearson or his partner Jack Anderson, (Mr. Hill, Mr. Scott, Mr. Millimet, Mr. Devine, Senator Bridges, Ralph Lavallee) is an agent of Drew Pearson within the meaning of this rule.

Mr. Pearson, however, is responsible for the conduct of his partner Jack Anderson and his employee, Larry Fernsworth.

New York Times v. *Sullivan*, 376 U.S. 254, 287 (1964).
Egan v. *Dotson*, 155 N.W. 789 (S.D. 1915).

* * *

DEFENDANT'S REQUEST FOR INSTRUCTION NO. 9

NANA cannot be found guilty of malice in either sense if it relied on a source, even a single source, whose reliability it had no reason to suspect. If, therefore, you find that NANA in this case relied on Drew Pearson as a reliable source for the charges made in the column which it distributed, your verdict must be for the defendant NANA.
New York Times v. *Connor*, 365 F. 2d 567 (C.A. 5, 1966).

* * *

DEFENDANT'S REQUEST FOR INSTRUCTION NO. 12

Probable cause for belief in the truth of a statement is undoubtedly a circumstance, and a strong one, to rebut any presumption of malice.
Baer v. *Rosenblatt*, 106 N.H. 26 at p. 31, (1964) quoting *State* v. *Burnham*, 9 N.H. 34, 44 (1837).

* * *

DEFENDANT'S REQUEST FOR INSTRUCTION NO. 20

Where an article is published and circulated among voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without malice, the article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff; and in such a case the burden is on the plaintiff to show actual malice in the publication of the article.
New York Times v. *Sullivan*, 376 U.S. 254, 280, 281.

* * *

DEFENDANT'S REQUEST FOR INSTRUCTION NO. 24

A man may be a bootlegger who was engaged in any way in illicit liquor traffic. One who aids or abets another in the sale of transportation of liquor can be said to be a bootlegger.
Riceman v. *Union Indemnity Co.*, 278 Mass. 149, 179 N.E. 629.

* * *

HILLSBOROUGH, SS. SUPERIOR COURT SEPTEMBER TERM, 1966

[Title Omitted]

RESERVED CASE

This was an action designated a plea of trespass and libel in which the plaintiff sought to recover damages because of the distribution to the defendant Monitor-Patriot and other newspapers in New Hampshire by the defendant North American Newspaper Alliance (designated in the writ as Bell Syndicate, Inc.), and the publication by the defendant, Monitor-Patriot Co., on or about September 10, 1960 in the Concord Daily Monitor and New Hampshire Patriot, of a certain newspaper column called "D. C. Merry-Go-Round" written by or under the supervision of Drew Pearson. Copy of said column is printed in the appendix.

The plaintiff alleged that the column was defamatory as to him because it was:

> "... intended to convey, and did convey, to readers thereof the meanings and impressions (1) that the plaintiff at one time sold, and engaged in the business of selling and illegally transporting, intoxicating liquor, criminal actions in violation of the laws of the United States and the State of New Hampshire, (2) that plaintiff was improperly attempting by underhanded means to secure the release from jail of said Frank L. Sullivan for the purpose of inducing him to run as a straw or fraudulent candidate for the Democratic nomination to the United States Senate, thereby rigging and fixing this election in favor of plaintiff's own candidacy therein, and (3) that the plaintiff was improperly and unethically cooperating with and assisting a candidate for the same office in the opposing political party, the Republican Senatorial

incumbent, Styles Bridges, for money or other consideration, in an attempt to induce said Sullivan to run as a straw candidate in the Democratic primary Senatorial ballotting, in order to bolster the re-election prospects of said Bridges by rigging and fixing said election in his favor...."

The defendants filed an answer and an amended answer setting forth a brief statement of defense in addition to the general denial. Among other defenses, the defendants relied upon publication in the ordinary course of business in good faith upon a lawful occasion for a justifiable purpose of informing the public upon matters of public concern, and with reasonable cause to believe that the statements published were true. The defendants denied any malice.

The case was submitted to the jury by treating the three claims of the plaintiff specified above as separate counts. Count One, the so-called bootlegger count, was submitted to the jury as against both defendants. As to the defendant, North American Newspaper Alliance (herein NANA) a verdict was directed for the defendant NANA on both Counts Two and Three. The plaintiff seasonably excepted to the directed verdict on these counts as to the defendant NANA.

The jury returned verdicts for the plaintiff against both defendants. Each verdict was in the sum of Ten Thousand Dollars ($10,000.00).

During the course of the trial, the defendants seasonably excepted to the denials of their motions for nonsuit and directed verdicts, to certain rulings of the Court admitting and excluding evidence, allowing portions of plaintiff's argument, and disallowing portions of the argument for the defendants, and to certain portions of the Court's charge, and to the failure of the Court to charge as requested, all of which appear more particularly in the transcript. Both defendants objected and excepted to the court's fail-

ure to instruct the jury that as to Count One, in order for the plaintiff to recover, he would have to prove that each defendant acted with reckless disregard of the truth or falsity of the statement that the plaintiff was a former small time bootlegger. Both defendants in taking these exceptions, relied upon the constitutional guarantees of free speech and press contained in the First and Fourteenth Amendments to the Constitution of the United States as interpreted by the United States Supreme Court in *New York Times* v. *Sullivan,* 376 U.S. 254 and subsequent cases cited to the Court.

During the course of the trial the plaintiff seasonably excepted to certain rulings of the Court granting and denying motions, admitting and excluding evidence, allowing and disallowing parts of arguments by counsel, to certain portions of the Court's charge, and to the failure of the Court to charge as requested, all of which appear more particularly in the transcript.

After verdict, the court, over the objection of the defendants, recalled the jury and interrogated them as to what total amount of money they intended the plaintiff to receive. The reply of the foreman is printed in the appendix.

After verdicts, both defendants filed motions for correction of the verdicts on the issue of damages, to set aside the verdict in each case for the plaintiff, and to enter judgment for each defendant notwithstanding the verdict. All of the defendants' motions were denied subject to the defendants' seasonable exceptions. These and other exceptions appear in the transcript and the appendix.

All questions of law raised by the foregoing exceptions or any exceptions appearing in the transcript or appendix are reserved and transferred.

The pleadings, including all motions with the court's action thereon, the defendants' and the plaintiff's requests

for instructions, together with a list of the exhibits transferred, are to be printed as an appendix.

The testimony is to be transcribed and transferred in accordance with the Rules of Court including the Court's charge, arguments and conferences between Court and Counsel.

Reserved and Transferred.

THOMAS J. MORRIS
Presiding Justice

[SUPERIOR COURT]

(Interrogation and reply of foreman after verdict filed Dec. 22, 1966.)

In your verdict against the defendant Monitor Patriot Company, in the event you returned a verdict for the plaintiff in that action, how much did you include as representing damages resulting from publication of the bootlegger reference? *Ten Thousand* — ($10,000)

REGINALD E. B. BAGNALL
Foreman

[NEW HAMPSHIRE SUPREME COURT]

Hillsborough,
No. 5780.

ROSELLE A. ROY, EXECUTRIX OF THE WILL OF ALPHONSE ROY

v.

MONITOR-PATRIOT CO.
NORTH AMERICAN NEWSPAPER ALLIANCE, INC.

Argued February 4, 1969.
Decided June 30, 1969.

Bois, Laflamme & Kalinski and *McLane, Carleton, Graf, Greene & Brown* (*Mr. Stanley M. Brown* orally), for the plaintiff.

Devine, Millimet, McDonough, Stahl & Branch and *Robert A. Backus* (*Mr. Joseph A. Millimet orally*), for the defendants.

GRIMES, J. This action for libel was tried before *Morris*, J. and jury resulting in verdicts against each defendant in the amount of $10,000. Alphone Roy died after the trial and his executrix has appeared.

The action arose out of the publication on September 10, 1960, in the Concord Daily Monitor and New Hampshire Patriot of Drew Pearson's syndicated column "D.C. Merry-Go-Round" which referred to Alphonse Roy who was running in the Democratic primary for nomination as that party's candidate for the United States Senate. The column was distributed by the defendant North American Newspaper Alliance, Inc. (NANA) under a contract with Pearson. The publication complained of read in part as follows: "One of [Democratic candidate for U.S. Senate] Hill's primary opponents, Frank L. Sullivan, was released from the Grasmere County Work Farm just in time to file for the Senate. With a police record of no fewer than 19 convictions for drunkenness since 1945, he was serving his latest 90-day sentence.

"Curious Call

"To make sure he would get out in time to run for the Senate, a former small-time bootlegger and later U. S. Marshall, Alphone Roy, telephoned the Grasmere warden about Sullivan.

"Ralph LaVallee, in charge of Grasmere, admitted to this column that he had received a telephone inquiry from Roy as to whether Sullivan would be released in time to file. But the warden denied another report that Roy had announced he was calling 'on behalf of my friend Styles [Bridges, Republican U. S. Senator from New Hampshire].'

" 'I don't want to get implicated in anything like that,' said LaVallee. 'Roy didn't mention Senator Bridges.'

"Sullivan happily got out of the workhouse in time to run for the most distinguished legislative body in the world. And who should turn up on the ballot but the same Alphonse Roy who was so eager to get him out of the clink.

"Because of the peculiar population division of New Hampshire, The Irish Catholics may be inclined to vote for a Frank Sullivan while The French Canadians could be attracted by a name like Alphonse Roy. The effect would be to cut down on Herb Hill's chances."

Plaintiff's declaration made three claims which were treated at the trial as separate counts complaining that; (1) The bootlegger statement imputed criminal conduct; (2) The reference to the Sullivan candidacy imputed improper and unethical conduct by seeking his release from jail and inducing him to run as a straw candidate; and (3) He was charged with being engaged in unethically cooperating with a candidate in the opposite political party by inducing Sullivan to run as a straw candidate.

A verdict was directed in favor of NANA on counts 2 and 3 subject to plaintiff's exception. All three counts were submitted against Monitor, but the jury, in answer to a special question, reported that all of the damages assessed against that defendant were based on the bootlegger count.

The case was tried on the basis that since he was a candidate for the United States Senate, publications about Roy would come under the same constitutional protection as where public officials are involved under *New York*

Times v. *Sullivan*, 376 U.S. 254. However, the Trial Court instructed the jury that if they found that the bootlegger publication was a public affair on a par with official conduct of public officials, they were to return a verdict in favor of NANA, and that in considering the case against Monitor they should follow instructions based upon the *New York Times* rule. He also instructed the jury, that if they found that the bootlegger publication would not touch upon or be relevant to Roy's fitness for public office "but was rather a bringing forward of the plaintiff's long-forgotten misconduct in which the public had no interest, then it would be a private matter in the private sector" and that they should consider the claim against both defendants under the law relating to private libels. The verdict against NANA shows that the jury found the publication to be in the private sector, for under the charge if they found otherwise, they were directed to bring in a verdict in favor of NANA.

The main issue in the case as it comes to us, therefore, is whether the bootlegger part of the publication could be found to be a purely private defamation and outside the constitutional protections of the *New York Times* rule which permits recovery only on proof that the publications were knowingly false or that they were false and were published with reckless disregard of the truth.

Reference was made to private libels in *Garrison* v. *Louisiana*, 379 U.S. 64, which arose out of the conviction of Garrison under a Louisiana criminal defamation statute. He had published a statement relating to the eight judges of the Criminal District Court of Orleans Parish in which he attributed the large backlog of cases to the inefficiency, laziness and excessive vacations of the judges, and impugned their motives in refusing to authorize the use of funds for undercover investigations of vice, which conduct

he said raised questions of racketeer influences on the judges.

The Court, in discussing the "good motives" restriction appearing in the laws of many states, said "We need not be concerned whether the limitation serves a legitimate state interest to the extent that it reflects abhorrence that 'a man's forgotten misconduct . . . *in which the public had no interest*, should be wantonly raked up, and published to the world, on the ground of its being true.' " (Emphasis on original) In a footnote (N. 8), the court recognized that different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned and stated that nothing being said was to be taken as an expression of views on the impact of the Constitution in the "discreet area of purely private libels."

We are of the opinion that the constitutional protections of *New York Times* v. *Sullivan* and later cases do not extend to all statements about public officials or candidates for office, but only to those which relate to their official conduct or fitness for office, and that there may be purely private libels against such persons which will be governed by state law, unrestricted by the Federal Constitution. We therefore do not accept the contention of the defendants that the "official conduct" limitation of *New York Times* v. *Sullivan* has been discarded. *Time, Inc.* v. *Hill*, 385 U.S. 374 which dealt with nondefamatory matters as an invasion of privacy is not authority for the defendants' contention. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, note 11.

Defendants contend that the bootlegging statement could not be found to be a "purely private defamation." *Garrison* v. *Louisiana, supra.* The evidence fails to reveal that any prosecution for criminal activity of any kind was ever brought against Alphonse Roy. His only brush with the law was in January 1923 when he was taken to the police

station after a raid when he was present in a near beer parlor run by his brother. He was not charged with any violation and was released. This was 37 years before the publications here in question. Since prohibition ended in 1934, it is not probable that the bootlegger statement would be understood to refer to any activity within 26 years of the publication. Although there was evidence that there were rumors in the mid-twenties that plaintiff was a bootlegger, it was findable from the evidence that these had died out before he was elected to the Executive Council in 1932.

Although engaging in criminal activity even such as small-time bootlegging might be difficult to exclude from those things which affect fitness for office if it were alleged to have occurred recently its inclusion as a matter of law becomes less clear with the passage of a long period of time.

We are of the opinion that small-time bootlegging activity which occurred some 26 or 27 years in the past could be found to have lost its relevancy to prove the present fitness or unfitness of a candidate. The Trial Judge must have made this preliminary determination when he decided to submit the issue to the jury, and the jury must have so found when they determine the defamation to have been a private one.

Defendants contend that the Court's charge was so complicated, confused and misleading that the jury could not have understood or followed it. Complicated cases may require complicated charges, and this was a complicated case. The verdicts of the jury indicate an understanding of the instructions, and we think it is "reasonably certain that the jury understood them." *McLeod* v. *Caprarello*, 95 N.H. 343, 344; *Locke* v. *Cressy Company*, 108 N.H. 116, 118. We also disagree with the defendants' contention that in the private sector a lawful occasion existed as a matter of law, and we find no error in the charge relating to

private libels. The other contentions of the defendants allege errors in the charge relating to malice and recklessness if the publication were found to be in the public sector. Since this was not the basis of the verdicts, it is unnecessary to consider these contentions.

The plaintiff requests that we determine whether the Court erred in directing a verdict in favor of NANA in the event the jury found the publication to be in the public sector. Since the verdicts were based on a finding that the publication was a private libel, the question is moot.

Judgments on the verdicts.

LAMPRON and GRIFFITH, JJ., did not sit; the others concurred.

Supreme Court of the United States

No. 891 ----, *October Term, 19* 69

Monitor Patriot Co., et al.,

Petitioners,

v.

Rosselle A. Roy, etc.

Order allowing certiorari. *Filed* February 24 ----, *19* 70.

The petition herein for a writ of certiorari to the Supreme Court of the State of New Hampshire *is granted*, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM 1969

No. ~~891~~ 62

MONITOR PATRIOT CO.
NORTH AMERICAN NEWSPAPER ALLIANCE, INC.,
PETITIONERS,

v.

ROSELLE A. ROY,
EXECUTRIX OF THE WILL OF ALPHONSE ROY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

Submitted by,
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In the
Supreme Court of the United States

OCTOBER TERM 1969

No.

MONITOR PATRIOT CO.
NORTH AMERICAN NEWSPAPER ALLIANCE, INC.,
PETITIONERS,

v.

ROSELLE A. ROY,
EXECUTRIX OF THE WILL OF ALPHONSE ROY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

Petitioners, Monitor Patriot Co., and North American Newspaper Alliance, Inc. pray that a writ of certiorari issue to review the "judgments on the verdicts" entered in the Supreme Court of New Hampshire in the above entitled case.

Opinion Below

The opinion of the Supreme Court of New Hampshire, in the case pending therein entitled *Roselle A. Roy, Executrix of the Will of Alphonse Roy* vs. *Monitor Patriot Co.*,

North American Newspaper Alliance, Inc., is reported at 109 N.H. — and at 254 A2d 832. A copy of the opinion is attached to this petition as Appendix "A".

Jurisdiction

The opinion of the Supreme Court of New Hampshire ordered "judgments on the verdicts" and was decided on June 30, 1969. A motion for re-hearing was seasonably made and was denied on July 30, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

Question Presented

This is an action for libel brought by the late Alphonse Roy and now by his widow as respondent. The petitioners, defendants below, were charged with publishing a column on September 10, 1960; known as the "D.C. Merry-Go-Round," written by Drew Pearson, defamatory of Roy. Pearson in this column discussed New Hampshire politics and the candidacy of Alphonse Roy and certain others for the Democratic nomination for United States Senator. In the course of the discussion of Roy's candidacy, Pearson referred to Roy as a "former small time bootlegger and later U.S. Marshal."

Roy brought suit against petitioners in Hillsborough County (New Hampshire) Superior Court and trial by jury was had in December, 1966.

The Trial Court denied timely defense motions for dismissal and judgment and charged the jury that, although Roy was a public official within the meaning of this Court's decisions in *New York Times* vs. *Sullivan*, 376 U.S. 254, and subsequent cases, the jury could return verdicts for the plaintiff without a finding of "reckless disregard of the truth" on the part of petitioners, if they found the "boot-

legger" reference to be a "purely private libel" unrelated to Roy's candidacy for public office.[1]

By its special verdicts, awarding ten thousand dollars ($10,000.00) against each respondent, the jury did so find. The Supreme Court of New Hampshire, in ordering judgment on the verdicts affirmed the action of the Trial Court permitting the jury to find that the reference to a candidate for the United States Senate as a "former small time bootlegger" was a "purely private libel", outside the scope of the constitutional privilege created in the *New York Times* case. The question presented, therefore, is:

Did the Supreme Court of New Hampshire, in sustaining verdicts against petitioners, incorrectly apply the principles of the *New York Times* case and its progeny by holding that the Trial Court acted correctly in permitting the jury to find that a reference to the adult criminal conduct of a candidate for the United States Senate was a "purely private libel", beyond the scope of the constitutional privilege established by this Court's opinion in *New York Times* vs. *Sullivan*?

Otherwise stated, the question presented is: Did the action of the Trial Court in permitting a libel verdict against petitioners without evidence of either knowing falsehood or reckless disregard of the truth, deprive petitioners and their readers, of their rights of freedom of speech and of the press guaranteed by the First Amendment in the circumstances of this case?

Constitutional Provisions Involved

The First and Fourteenth Amendments to the Consti-

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[1] The subsequent cases petitioners relied on below, and rely on here are: *Garrison* v. *Louisiana*, 379 U.S. 64; *Rosenblatt* v. *Baer*, 383 U.S. 75; *Time, Inc.* v. *Hill*, 385 U.S. 374; *Beckley Newspaper Corp.* v. *Hanks*, 387 U.S. 81, *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130; and *St. Amant* v. *Thompson*, 390 U.S. 727.

tution of the United States, as applied in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and subsequent cases.

Statement of the Case

This is an action in libel brought by the late Alphonse Roy against petitioners, the Monitor Patriot Co. (hereinafter "the Monitor"), publisher of a daily newspaper in Concord, New Hampshire, known as "The Concord Monitor" and the North American Newspaper Alliance (hereinafter "NANA") distributor of a large variety of syndicated features to newspapers throughout the country, including the "D.C. Merry-Go-Round" by the late Drew Pearson.

The claimed defamation arose out of allegations contained in a Drew Pearson column distributed to various newspapers, including five in New Hampshire, by NANA and published by the Monitor on Saturday, September 10, 1960. A copy of the Pearson column is attached hereto as Appendix B.

The plaintiff Roy complained of three items in the column: the allegation that he was a former "small time bootlegger," the allegation that the plaintiff had attempted to procure straw candidates to run with him in the 1960 Democratic senatorial primary, and the allegation that the plaintiff had acted in a politically unethical manner in assisting the Republican incumbent, Senator Styles Bridges, by filing the straw candidates. Of these complaints, for reasons explained hereafter, only the "bootlegger" reference remains in the case. It is this reference alone which provides the basis of the judgments here sought to be reviewed.

The Pearson column, Appendix B, was entirely about domestic politics. After naming certain Congressmen who obtained free rides home with the Air Force at the close

of Congress, the column focused exclusively on the New Hampshire political situation, with its major emphasis on the Democratic primary for the U.S. Senate.

At this time, the plaintiff Alphonse Roy was a candidate for the Democratic nomination for United States Senator. Roy was a veteran of New Hampshire politics, having first attained elective office thirty-six years before when he was elected to the New Hampshire House of Representatives. (Transcript, Vol. 7, page 142, hereafter abbreviated Tr. 7:142). He had also shared a seat in Congress for one term in 1936 after a famous disputed election with the Republican incumbent. (Tr. 7:144).

The Pearson column, insofar as it referred to Roy, was based on information provided to Pearson by various people active in the Democratic primary campaigns. Pearson had been told by one source, a man named Joseph Scott, that Roy had been a bootlegger (Tr. 5:46). Scott had described to Pearson a speakeasy he had been in run by Roy. (Tr. 5:47). Furthermore, other information provided by Scott concerning the criminal records of the straw candidates proved to be accurate. (Tr. 5:47).

The case was tried in Hillsborough Superior Court before a judge and jury in December, 1966. The Trial Court ruled, and the parties agreed, that Roy, as a candidate for the U.S. Senate, was a public official within the meaning of *New York Times v. Sullivan*. (See excerpt from Respondent's Brief below, attached hereto as Appendix C.) The parties also agreed that the principles of the *New York Times* case were applicable to this case. (Tr. 3:116-117), although plaintiff's counsel did not admit this on the appeal.

However, despite this agreement, no evidence was adduced at a trial that petitioners had been guilty of publishing the "bootlegger" allegation either with knowledge of its alleged falsity or in reckless disregard of its truth

or falsity, within this Court's teaching in *New York Times*. In fact, the only evidence on this issue indicated that these petitioners merely did not undertake any independent investigation of whether the plaintiff had been a bootlegger, but relied on the author, Drew Pearson. The then president of the Monitor testified:

> Q: "Did you have at your newspaper, Mr. Langley, any facilities to check whether what Mr. Pearson was saying in those regards was true or false?"
>
> A: "We have no means. We have to buy columns, the Associated Press news, and so on, and we have to take them on faith. We do not have the facilities or the means or the time to go back and re-check everything which is delivered to us, even by our own town correspondents." (Tr. 2:134)

The then city editor of the Monitor, Enoch Shenton, testified he undertook no independent investigation of the "bootlegger" reference because he himself had heard it reported that the plaintiff had been a bootlegger:

> Q: "Well, in regard to background and in information, what had you, if anything, heard about Mr. Roy?"
>
> A: "Well, I recall very early in my newspaper career hearing that he had been a bootlegger. In fact, I think when I was first a State House reporter, he was at that time a bootlegger. That was the impression I got from my contacts at the State House.
>
> Q: "You mean from stories around the State House?"
>
> A: "From information that was given to me."
>
> Q: "Well, some specific knowledge or general?"
>
> A: "General knowledge. I was too young to drink then."

Q: "And this occurred in the course of your duties around the State House?"

A: "Yes."

Q:: "On more than one occasion?"

A: "Frequently."

Q: "And this was before Mr. Roy was elected to Congress?"

A: "He was elected to Congress in 1936. This was before then.

Q: "So when you saw the story, is this why you printed it?"

A: "No. I saw nothing in the story that was likely to cause any trouble. That was my—would have been my motivation if I had seen anything that was damaging. I would have stopped it."

Q: "Did you have any personal ill will toward Mr. Roy?"

A: "No." (Tr. 9:32-33)

With regard to NANA, Drew Pearson testified:

Q: "(By plaintiff's counsel) Mr. Pearson, we'll try it this way: Under what circumstances, does NANA undertake to investigate the truth or falsity of factual material that you put into your column.

A: "Well, every day their editor reads the column and checks back with me on certain facts in the column Now, sometimes he may question something, sometimes he doesn't. Almost every day he'll have a few suggestions one way or the other. If there's some major question of which he is afraid has a risk of libel in it, then he will take it up with the manager of the syndicate, the manager of the syndicate will teletype back to me or get me on the telephone, and we will—I will tell him what my sources are, how good they

> are, whom I have talked to, and sometimes I will change something. Almost every day I'll change something at their suggestion. I think the day that I left Washington, which was—my memory is getting bad because I've been moving around so quickly. Thursday I left Washington, today's Friday, and there was something came up that I changed. I know there was, but I can't remember what it was. But at any rate, if it's a major question, we'll hash it out, and sometimes—frequently I'll make a change at their suggestion, and on occasion I've held up a column for a couple of days so we could go into it further. In any showdown, if I want to exercise my veto, I can do it." (Tr. 5:69-70)

The absence of such evidence is in part explained because the plaintiff was content to rest on a showing only that the petitioners did not independently verify the factual matters in the column in the erroneous belief that this alone could constitute "recklessness". (Tr. 8:241,255; 10:52,84). This Court's opinion in *St. Amant* v. *Thomson*, 390 U.S. 727 (1968), holding that:

> "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

makes clear that the failure to verify, standing alone, cannot constitute a reckless disregard for the truth. Consequently, under applicable Constitutional standards, there was no evidence of conduct amounting to "actual malice" which would defeat the constitutional privilege created by *New York Times*.

Manner in Which Federal Question was Raised

Petitioners moved for a nonsuit and a directed verdict at the conclusion of plaintiff's opening statement (Tr.

2:79), at the close of plaintiff's case (Tr. 8:202), and at the close of all the evidence (Tr. 10:55-56, 99). In each case petitioners relied on the constitutional privilege of freedom of speech and press as elaborated in the *New York Times* case and its progeny. Specifically, petitioners argued that the plaintiff's failure to introduce or even proffer evidence of knowing falsehood or recklessness required that the action against them be dismissed as a matter of federal constitutional law.

The Trial Court granted the petitioner NANA's motion at the close of the plaintiff's case, only insofar as the plaintiff sought recovery for the references in the column about his political ethics. (These were the allegations that he had filed straw candidates and surreptiously been aiding the Republican incumbent, Styles Bridges.) The Court ruled that as a matter of law no evidence of a reckless disregard of the truth on NANA's part had been presented and that these were matters to which the constitutional privilege of *New York Times* applied. (Tr. 8:220,255). Otherwise, petitioners' motions were denied, subject to exception. (Tr. 2:81; 8:219; 10:98; 118, 119).

Then, despite the agreement of plaintiff's counsel that the rule of *New York Times* applied to this case, the Trial Court *sua sponte*, and over vigorous objection, charged the jury that it might return a verdict for the plaintiff without any finding that either petitioner was guilty of "actual malice," or recklessness, if the jury found the bootlegger allegations to be "a purely private libel". *In fact, the Court so far failed to follow the New York Times case as to this allegation that it permitted the jury to return a verdict for the plaintiff, on the private libel theory, even though it found the bootlegger allegation to be truthful.* This was on the ground that the publication of this allegation could be found not to have been "on a lawful occa-

sion" or, in *New York Times* terms, not constitutionally privileged.[2]

As to the other allegations, concerning the plaintiff's lack of political ethics, the Court properly instructed the jury that no award could be made without a finding that petitioners were guilty of recklessness or knowing falsity, since the publication of these matters was as a matter of law "on a lawful occasion", or, in *New York Times* terms, constitutionally privileged. And, in response to a special question, the jury properly refused the plaintiff any award for these allegations and stated that its entire verdict represented damages for the "bootlegger" allegation. The jury therefore made no finding that either petitioner was guilty of a reckless disregard of the truth in its handling of the column. Consequently, the judgments in this case rest on a finding in favor of a public official plaintiff, a candidate for the U.S. Senate, who prevailed without a showing that petitioners were recklessly disregardful of the truth. As such, these judgments are in direct violation of petitioners' constitutional privilege to publish without fear of libel verdicts, defeasible only on a showing of "actual malice" as defined in *New York Times*.

Petitioners again raised their federal constitutional objection to the verdicts by motions for judgment notwithstanding the verdicts or, in the alternative, for a new trial. The motions were denied. (See the Reserved Case, attached hereto as Appendix E.)

Petitioners then raised their federal constitutional objections by appeal to the Supreme Court of New Hamp-

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[2] See pertinent portions of the Court's charge, attached hereto as Appendix D, in the latter portion of which the Court charged that, under common law, truth would be a defense only if the matters were published "on a lawful occasion" and for a "justifiable purpose."

shire. As they had done throughout the trial, petitioners argued that any adult criminal conduct of a candidate for the U.S. Senate is, as a matter of law, a subject to which the *New York Times* privilege applies and that no evidence sufficient to defeat the privilege had been presented. The Supreme Court, however, ordered "judgments on the verdicts". A motion for re-hearing, also on federal constitutional grounds, was denied.

Reasons for Granting the Writ

1. The decision below should be reviewed and reversed because it erroneously interprets this Court's opinions in *New York Times* and subsequent cases. Specifically the Supreme Court of New Hampshire erroneously held that the plaintiff could recover, despite his status as a public official, without proof of actual malice, on the theory that allegations about his adult criminal conduct could be found to be unrelated to his fitness as a candidate for the U.S. Senate.

2. The decision below should be reviewed because it raises important questions about the scope of the constitutional privilege created in *New York Times,* not previously ruled on. Specifically, it very precisely presents the question of whether there is still an area of "purely private libel" outside the scope of *New York Times* in which libel plaintiffs who are public officials may recover without proof of "actual malice".

3. The decision below should be reviewed and reversed because it misinterpreted this Court's opinion in *Garrison* v. *Louisiana,* 379 U.S. 64, as holding that the adult criminal conduct of a candidate for the U.S. Senate could be so "unrelated to his fitness for office" that an alleged libel reciting such conduct would be outside the scope of the *New York Times* constitutional privilege.

4. The decision below should be reviewed and reversed because it deprived petitioners of federally guaranteed constitutional rights of freedom of press and speech which, although seasonably raised, were consistently denied in the courts below.

Conclusion

For the reasons stated, petitioners pray that a writ of certiorari be issued to the Supreme Court of New Hampshire. In addition, petitioners respectfully request this Court to summarily reverse the judgment of the Supreme Court of New Hampshire concurrent with its issuing the writ of certiorari.

Respectfully submitted,

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Attorney for Petitioners

Of Counsel:
ROBERT A. BACKUS

APPENDIX A

Hillsborough,

No. 5780.

ROSELLE A. ROY, EXECUTRIX OF THE WILL OF ALPHONSE ROY

v.

MONITOR-PATRIOT CO.

NORTH AMERICAN NEWSPAPER ALLIANCE, INC.

Argued February 4, 1969.

Decided June 30, 1969.

Bois, Laflamme & Kalinski and *McLane, Carleton, Graf, Greene & Brown (Mr. Stanley M. Brown* orally), for the plaintiff.

Devine, Millimet, McDonough, Stahl & Branch and *Robert A. Backus (Mr. Joseph A. Millimet* orally), for the defendants.

GRIMES, J. This action for libel was tried before *Morris, J.* and jury resulting in verdicts against each defendant in the amount of $10,000. Alphonse Roy died after the trial and his executrix has appeared.

The action arose out of the publication on September 10, 1960, in the Concord Daily Monitor and New Hampshire Patriot of Drew Pearson's syndicated column "D.C. Merry-Go-Round" which referred to Alphonse Roy who was running in the Democratic primary for nomination as that party's candidate for the United States Senate. The column was distributed by the defendant North American Newspaper Alliance, Inc. (NANA) under a contract with Pearson. The publication complained of read in part as follows: "One of [Democratic candidate for U.S. Senate] Hill's primary opponents, Frank L. Sullivan, was released from the Grasmere County Work Farm just in time to file for the Senate. With a police record of no fewer than 19 convictions for drunkenness since 1945, he was serving his latest 90-day sentence.

"Curious Call

"To fake sure he would get out in time to run for the Senate, a former small-time bootlegger and later U.S. Marshall, Alphonse Roy, telephoned the Grasmere warden about Sullivan.

"Ralph LaVallee, in charge of Grasmere, admitted to this column that he had received a telephone inquiry from Roy as to whether Sullivan would be released in time to file. But the warden denied another report that Roy had announced he was calling 'on behalf of my friend Styles [Bridges, Republican U.S. Senator from New Hampshire].'

" ' I don't want to get implicated in anything like that,' said LaVallee. 'Roy didn't mention Senator Bridges.'

"Sullivan happily got out of the workhouse in time to run for the most distinguished legislative body in the world. And who should turn up on the ballot but the same Alphonse Roy who was so eager to get him out of the clink.

"Because of the peculiar population division of New Hampshire, The Irish Catholics may be inclined to vote for a Frank Sullivan while The French Canadians could be attracted by a name like Alphonse Roy. The effect would be to cut down on Herb Hill's chances."

Plaintiff's declaration made three claims which were treated at the trial as separate counts complaining that; (1) The bootlegger statement imputed criminal conduct; (2) The reference to the Sullivan candidacy imputed improper and unethical conduct by seeking his release from jail and inducing him to run as a straw candidate in the opposite political party by inducing Sullivan to run as a straw candidate.

A verdict was directed in favor of NANA on counts 2 and 3 subject to plaintiff's exception. All three counts were submitted against Monitor, but the jury, in answer to a special question, reported that all of the damages assessed against that defendant were based on the bootlegger count.

The case was tried on the basis that since he was a candidate for the United States Senate, publications about Roy would come under the same constitutional protection as where public officials are involved under *New York Times* v. *Sullivan*, 376 U.S. 254. However, the Trial Court instructed the jury that if they found that the bootlegger publication was a public affair on a par with official conduct of public officials, they were to return a verdict in favor of NANA, and that in considering the case against Monitor they should follow instructions based upon the *New York Times* rule. He also instructed the jury, that if they found that the bootlegger publication would not touch upon or be relevant to Roy's fitness for public office "but was rather a bringing forward of the plaintiff's long-forgotten misconduct in which the public had no interest, then it would be a private matter in the private sector" and that they should consider the claim against both defendants under the law relating to private libels. The verdict against NANA shows that the jury found the publication to be in the private sector, for under the charge if they found otherwise, they were directed to bring in a verdict in favor of NANA.

The main issue in the case as it comes to us, therefore, is whether the bootlegger part of the publication could be found to be a purely private defamation and outside the constitutional protections of the *New York Times* rule which permits recovery only on proof that the publications were knowingly false or that they were false and were published with reckless disregard of the truth.

Reference was made to private libels in *Garrison* v. *Louisiana*, 379 U.S. 64, which arose out of the conviction of Garrison under a Louisiana criminal defamation statute. He had published a statement relating to the eight judges of the Criminal District Court of Orleans Parish in which he attributed the large backlog of cases to the inefficiency,

laziness and excessive vacations of the judges, and impugned their motives in refusing to authorize the use of funds for undercover investigations of vice, which conduct he said raised questions of racketeer influences on the judges.

The Court, in discussing the "good motives" restriction appearing in the laws of many states, said "We need not be concerned whether the limitation serves a legitimate state interest to the extent that it reflects abhorrence that 'a man's forgotten misconduct . . . *in which the public had no interest*, should be wantonly raked up, and published to the world, on the ground of its being true.' " (Emphasis on original) In a footnote (N. 8), the court recognized the different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned and stated that nothing being said was to be taken as an expression of views on the impact of the Constitution in the "discrete area of purely private libels."

We are of the opinion that the constitutional protections of *New York Times* v. *Sullivan* and later cases do not extend to all statements about public officials or candidates for office, but only to those which relate to their official conduct or fitness for office, and that there may be purely private libels against such persons which will be governed by state law, unrestricted by the Federal Constitution. We therefore do not accept the contention of the defendants that the "official conduct" limitation of *New York Times* v. *Sullivan* has been discarded. *Time, Inc.* v. *Hill,* 385 U.S. 374 which dealt with nondefamatory matters as an invasion of privacy is not authority for the defendants' contention. *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, note 11.

Defendants contend that the bootlegging statement could not be found to be a "purely private defamation." *Garrison* v. *Louisiana, supra.* The evidence fails to reveal that any prosecution for criminal activity of any kind was ever

brought against Alphonse Roy. His only brush with the law was in January 1923 when he was taken to the police station after a raid when he was present in a near beer parlor run by his brother. He was not charged with any violation and was released. This was 37 years before the publications here in question. Since prohibition ended in 1934, it is not probable that the bootlegger statement would be understood to refer to any activity within 26 years of the publication. Although there was evidence that there were rumors in the mid-twenties that plaintiff was a bootlegger, it was findable from the evidence that these had died out before he was elected to the Executive Council in 1932.

Although engaging in criminal activity even such as small-time bootlegging might be difficult to exclude from those things which affect fitness for office if it were alleged to have occurred recently its inclusion as a matter of law becomes less clear with the passage of a long period of time.

We are of the opinion that small-time bootlegging activity which occurred some 26 or 37 years in the past could be found to have lost its relevancy to prove the present fitness or unfitness of a candidate. The Trial Judge must have made this preliminary determination when he decided to submit the issue to the jury, and the jury must have so found when they determined the defamation to have been a private one.

Defendants contend that the Court's charge was so complicated, confused and misleading that the jury probably could not have understood or followed it. Complicated cases may require complicated charges, and this was a complicated case. The verdicts of the jury indicate an understanding of the instructions, and we think it is "reasonably certain that the jury understood them." *McLeod* v. *Caprarello*, 95 N.H. 343, 344; *Locke* v. *Cressy Company*, 108 N.H. 116, 118. We also disagree with the defendants' contention that

in the private sector a lawful occasion existed as a matter of law, and we find no error in the charge relating to private libels. The other contentions of the defendants allege errors in the charge relating to malice and recklessness if the publication were found to be in the public sector. Since this was not the basis of the verdicts, it is unnecessary to consider these contentions.

The plaintiff requests that we determine whether the Court erred in directing a verdict in favor of NANA in the event the jury found the publication to be in the public sector. Since the verdicts were based on a finding that the publication was a private libel, the question is moot.

Judgments on the verdicts.

LAMPRON AND GRIFFITH, JJ., did not sit; the others concurred.

APPENDIX B

Exhibit #1

D.C. MERRY-GO-ROUND

By Drew Pearson Sept. 10, 1960

(Editor's note — While Drew Pearson is taking a short vacation, his column is being written by his associate, Jack Anderson.)

WASHINGTON — With the closing of Congress, most members paid their own fare home or charged it against the two trips they are authorized to take each fiscal year. But a privileged few wangled free transportation from the Air Force.

Those whose committees pass on Air Force legislation and appropriations seemed to have the least trouble finding planes going their way.

The worst offender is South Carolina's brooding, flowing-haired Congressman L. Mendel Rivers, a power on the House Armed Services committee, who seems to regard the Air Force as his private airline. He need only snap his fingers, and the Air Force starts warming up a plane to fly him to his home in Charleston, S.C.

More than once, he has been the sole passenger in a giant C-54 pressed into service as his flying taxi. Sometimes the Air Force even provides attractive WAF hostesses to wait on him.

During the past summer, he has taken only the Air Force flights to South Carolina: one to Charleston in a C-54, the other to Myrtle Beach in a C-47. What cut down on his commuting, however, was a trip to the Far East. He traveled on Air Force planes, of course.

Free List

Here are others who have tumbled free rides home:

Sen. Strom Thurmond, South Carolina Democrat, was flown to Columbia, S.C., after the Senate adjourned. He

had taken earlier trips to the West Coast and Georgia, allegedly on reservist matters.

Congressmen Robert Hamphill of South Carolina and John Flynt of Georgia, both Democrats, were also dropped off near their homes after adjournment.

Earlier, Congressmen O. C. Fisher, Clark Thompson, Jack Brooks, and Bob Casey, all Texas Democrats, flew to Texas in Air Force planes.

Congressmen Charles Diggs of Michigan and Leonard Wolf of Iowa, both Democrats, also caught free flights to their home states.

An Air Force C-54 dropped Senate Armed Services chairman Dick Russell off at his home in Winder, Ga.

New York's blueblood Congressman Stuyvesant Wainright, Republican, saved the return fare from Bermuda by hitching a free ride with the Air Force.

Congressman Perkins Bass, New Hampshire Republican, caught an Air Force plane for the short hop from Washington to New York.

Political Snafu

Rock-ribbed Republican New Hampshire, whose ex- Gov. Sherman Adams was top kick in the White House for years and whose Sen. Styles Bridges is still top kick on the GOP side of the Senate, is so fouled up in a primary snafu that the state may go Democratic this year. The primary verdict is due next Tuesday.

Even that able Senate stalwart, Styles Bridges, is restirring himself. He has nothing to worry about from his Republican opponent, but the Democrats have put up a dynamic Dartmouth professor, Herbert Hill, against him. The professor came within 11,000 votes of defeating Sherman Adams, lately of vicuna-coat fame, in the 1948 gubernatorial race.

Curiously, the Democratic primary has been cluttered with a motley assortment of candidates who have chal-

lenged Hill for the privilege of running against Bridges. That sly, old Republican disclaims any connection with it, but he appears pleased over the muddying of Democratic waters.

One of Hill's primary opponents Frank L. Sullivan, was released from the Grasmere County Work Farm just in time to file for the Senate. With a police record of no fewer than 19 convictions for drunkenness since 1945, he was serving his latest 90-day sentence.

Curious Call

To make sure he would get out in time to run for the Senate, a former small-time bootlegger and later U.S. Marshall, Alphonse Roy, telephoned the Grasmere warden about Sullivan.

Ralph LaVallee in charge of Grasmere, admitted to this column that he had received a telephone inquiry from Roy as to whether Sullivan would be released in time to file. But the warden denied another report that Roy had announced he was calling "on behalf of my friend Styles."

"I don't want to get implicated in anything like that," said LaVallee. "Roy didn't mention Senator Bridges."

Sullivan happily got out of the workhouse in time to run for the most distinguished legislative body in the world. And who should turn up on the ballot but the same Alphonse Roy who was so eager to get him out of the clink.

Because of the peculiar population division of New Hampshire, the Irish Catholics may be inclined to vote for a Frank Sullivan while the French Canadians could be attracted by a name like Alphonse Roy. The effect would be to cut down Herb Hill's chances.

Convicts For Senator

Two other curious candidates, who tried to run in the Democratic primary against Hill, were Harold P. McCarthy who has a record of nine convictions for drunkenness, assault, and brawling, and Clement P. Robinson Jr.,

who has a record of six brushes with the law for drunkenness and traffic violations. Robinson also received a 30-day suspended sentence for stealing two power lawnmowers and a conviction for the nonsupport of his wife and three children.

But at least Professor Hill managed to persuade the New Hampshire Ballot Law Commission into knocking McCarthy and Robinson off the ballot.

The bitterest primary battle, however, is between the two Republican gubernatorial candidates, Gov. Wesley Powell and ex-Gov. Hugh Gregg. Powell not only incurred the ire of Vice President Nixon last winter by riding in front of Nixon in the GOP parade through Manchester, but is also antagonizing stanch Republicans by throwing longtime GOP stalwarts out of state jobs in an attempt to build up a personal Powell machine.

Bernard L. Boutin, ex-Mayor of Laconia who is running for governor on the Democratic ticket, may emerge as the final victor after the smoke has settled.

APPENDIX C

Excerpt from plaintiff's brief in the Supreme Court of New Hampshire, page 12.

"For the purposes of trial of this case, plaintiff's counsel agreed that Roy as a candidate was within the general concept of 'public official' as conceived in *New York Times* . . .

APPENDIX D

Excerpts from the Court's charge to the jury. (Tr. 10:127), (Tr. 10:135).

1. "As to this part of the publication, there is an issue of fact for you to decide. Your determination of this issue of fact will decide where you go in regard to the law as I give it to you:

   Is it more probable than otherwise that the publication that the plaintiff was a former small-time bootlegger was a public affair on a par with official conduct of public officials?

   As a candidate for the United States Senate, the plaintiff was within the public official concept, and a candidate must surrender to public scrutiny and discussions so much of his private character as affect his fitness for office. That is, anything which might touch on Alphonse Roy's fitness for the office of United States Senator would come within the concept of official conduct. If it would not touch upon or be relevant to his fitness for the office for which he was a candidate, but was rather a bringing forward of the plaintiff's long forgotten misconduct in which the public had no interest, then it would be a private matter in the private sector.

   That is, I say this is a question of fact for you to decide on the evidence in the case. The plaintiff has the burden of proving that it is in the private sector."

2. "If you have decided that it is a private defamation, the plaintiff would be entitled to recover, that is you would bring in a verdict for the plaintiff in regard to the private defamation unless the defendants — and the evidence applies to each one of them, all the evidence in the case — unless it is more probable than otherwise that the publication of the defamatory matter was justified or that it was conditionally privileged.

Now, justification is established — and the defendants have the burden of proof, if you are in the private sector on justification — is established if the facts stated are true and are published with a justifiable motive. That is, there are two issues there:
First, whether the published matter is true, and, secondly, whether it is published from a justifiable motive, that is, to give to persons entitled to know the information so they can act upon it."

APPENDIX E

THE STATE OF NEW HAMPSHIRE
Superior Court
Hillsborough, ss. September Term, 1966
Roselle A. Roy, Executrix Under the Will of
Alphonse Roy
vs.
Monitor-Patriot Co.
North American Newspaper Alliance, Inc.
RESERVED CASE

This was an action designated a plea of trespass and libel in which the plaintiff sought to recover damages because of the distribution of the defendant Monitor-Patriot and other newspapers in New Hampshire by the defendant North American Newspaper Alliance (designated in the writ as Bell Syndicate, Inc.), and the publication by the defendant, Monitor-Patriot Co., on or about September 10, 1960 in the Concord Daily Monitor and New Hampshire Patriot, of a certain newspaper column called "D.C. Merry-Go-Round" written by or under the supervision of Drew Pearson. Copy of said column is printed in the appendix.

The plaintiff alleged that the column was defamatory as to him because it was:

> ". . . intended to convey, and did convey, to readers thereof the meanings and impressions (1) that the plaintiff at one time sold, and engaged in the business of selling and illegally transporting, intoxicating liquor, criminal actions in violation of the laws of the United States and the State of New Hampshire, (2) that plaintiff was improperly attempting by underhanded means to secure the release from jail of said Frank L. Sullivan for the purpose of inducing him to run as a straw or fraudulent candidate for the Democratic nomination to the United States Senate, thereby

rigging and fixing this election in favor of plaintiff's own candidacy therein, and (3) that the plaintiff was improperly and unethically cooperating with and assisting a candidate for the same office in the opposing political party, the Republican Senatorial incumbent, Styles Bridges, for money or other consideration, in an attempt to induce said Sullivan to run as a straw candidate in the Democratic primary Senatorial balloting, in order to bolster the re-election prospects of said Bridges by rigging and fixing said election in his favor. . . ."

The defendants filed an answer and an amended answer setting forth a brief statement of defense in addition to the general denial. Among other defenses, the defendants relied upon publication in the ordinary course of business in good faith upon a lawful occasion for a justifiable purpose of informing the public upon matters of public concern, and with reasonable cause to believe that the statements published were true. The defendants denied any malice.

The case was submitted to the jury by treating the three claims of the plaintiff specified above as separate counts. Count One, the so-called bootlegger count, was submitted to the jury as against both defendants. As to the defendant, North American Newspaper Alliance (herein NANA) a verdict was directed for the defendant NANA on both Counts Two and Three. The plaintiff seasonably excepted to the directed verdict on these counts as to the defendant NANA.

The jury returned verdicts for the plaintiff against both defendants. Each verdict was in the sum of Ten Thousand Dollars ($10,000.00).

During the course of the trial, the defendants seasonably excepted to the denials of their motions for nonsuit and directed verdicts, to certain rulings of the Court admitting

and excluding evidence, allowing portions of plaintiff's argument, and disallowing portions of the argument for the defendants, and to certain portions of the Court's charge, and to the failure of the Court to charge as requested, all of which appear more particularly in the transcript. Both defendants objected and excepted to the court's failure to instruct the jury that as to Count One, in order for the plaintiff to recover, he would have to prove that each defendant acted with reckless disregard of the truth or falsity of the statement that the plaintiff was a former small-time bootlegger. Both defendants in taking these exceptions, relied upon the constitutional guarantees of free speech and press contained in the First and Fourteenth Amendments to the Constitution of the United States as interpreted by the United States Supreme Court in *New York Times* v. *Sullivan*, 376 U.S. 254 and subsequent cases cited to the Court.

During the course of the trial the plaintiff seasonably excepted to certain rulings of the Court granting and denying motions, admitting and excluding evidence, allowing and disallowing parts of arguments by counsel, to certain portions of the Court's charge, and to the failure of the Court to charge as requested, all of which appear more particularly in the transcript.

After verdict, the court, over the objection of the defendants, recalled the jury and interrogated them as to what total amount of money they intended the plaintiff to receive. The reply of the foreman is printed in the appendix.

After verdicts, both defendants filed motions for correction of the verdicts on the issue of damages, to set aside the verdict in each case for the plaintiff; and to enter judgment for each defendant notwithstanding the verdict. All of the defendants' motions were denied subject to the defendants' seasonable exceptions. These and other excep-

tions appear in the transcript and the appendix.

All questions of law raised by the foregoing exceptions or any exceptions appearing in the transcript or appendix are reserved and transferred.

The pleadings, including all motions with the court's action thereon, the defendants and the plaintiff's requests for instructions, together with a list of the exhibits transferred, are to be printed as an appendix.

The testimony is to be transcribed and transferred in accordance with the Rules of Court including the Court's charge, arguments and conferences between Court and Counsel.

Reserved and Transferred.

Thomas J. Morris
Presiding Justice

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In the

Supreme Court of the United States

OCTOBER TERM 1969

No. ~~691~~ 62

MONITOR PATRIOT CO.
NORTH AMERICAN NEWSPAPER ALLIANCE, INC.,
PETITIONERS,

v.

ROSELLE A. ROY,
EXECUTRIX OF THE WILL OF ALPHONSE ROY,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

BOIS, LAFLAMME & KALINSKI, and
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In the

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No. 891

MONITOR PATRIOT CO.
NORTH AMERICAN NEWSPAPER ALLIANCE, INC.,
PETITIONERS,

v.

ROSELLE A. ROY,
EXECUTRIX OF THE WILL OF ALPHONSE ROY,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

Respondent Roselle A. Roy, Executrix of the Will of Alphonse Roy, prays that the writ sought herein be denied since the Supreme Court of New Hampshire decided the question involved in accordance with the requirements of the Constitution of the State of New Hampshire, the Constitution of the United States, and decisions of this Court insofar as applicable.

Opinions Below

The opinion below on which the Petition is based is *Roselle A. Roy, Executrix of the Will of Alphonse Roy v. Monitor Patriot Co., North American Newspaper Alliance, Inc.*, 109 N.H.—, 254 A2d 832 (1969) and is Appendix A to the Petition. A prior transfer in the same case on another point is reported as *Roy v. North American Newspaper Alliance* in 106 N.H. 92, 205 A2d 844 (1964).

Question Presented

This is an application for Writ of Certiorari to the New Hampshire Supreme Court, to review its judgment on verdicts returned on *one count only* of a libel action involving three counts. The question suggested for review is whether the Court below correctly applied *New York Times v. Sullivan*, 276 U.S. 254, in affirming the Trial Court's submitting as a question of fact to a jury whether charging falsely in 1960 that a candidate for U.S. Senate was "a former small time bootlegger" in the 1920's was a publication entitled to qualified privilege under *New York Times*, or whether it was purely private libel beyond the boundaries of factual reporting on the "official conduct" of the candidate and hence beyond the scope of the *New York Times* strictures.

The jury found that the publication was "purely private libel" on the facts in evidence, and applied local law exemplified in *Chagnon v. Union Leader*, 103 N.H. 426, 174 A 2d 825, *cert. denied*, 369 U.S. 830 and in *Baer v. Rosenblatt*, 106 N.H. 26, 203 A 2d 773, *rev'd on other grounds* sub nominee *Rosenblatt v. Baer*, 383 U.S. 75.

In the trial of the cause, for reasons hereafter outlined, the Trial Court ruled (erroneously in our view) that the "actual malice" of the writer, the late Drew Pearson, was *not* attributable to the Petitioners, although it is now admitted for the first

time in this Court, that Pearson was the real party in interest throughout. This respondent's contentions that the Trial Court erred with regard to this aspect of the case were not ruled upon below, as being moot in light of the result reached. Since they will become relevant should the writ issue, we brief them herein.

It is the position of Respondent that the writ should not issue and that the case was disposed of below in accordance with relevant constitutional law. Should the writ nevertheless issue, Respondent suggests that there are other questions that merit review which flow from the relationship of syndicated national columnists to the publishing press and victims of defamation emanating from such sources. Respondent does not cross-file for certiorari because of the fact that the original plaintiff, Roy, and the real party in interest defendant, Pearson, and other material witnesses, have now deceased so that a new trial would serve no useful purpose.

Statement of the Case

1. *Pearson, NANA, and Monitor*:

These actions of trespass and libel were instituted in 1960 against the Monitor Patriot Co. because of its publication of the September 10, 1960 Drew Pearson column in the *Concord Monitor*, a daily newspaper published in the State capital. Monitor, being a New Hampshire corporation, was unquestionably subject to the jurisdiction of the New Hampshire court. North American Newspaper Alliance (NANA), being a foreign corporation, contested jurisdiction, but was held subject to service because it was doing business in the State, in *Roy v. North American Newspaper Alliance, supra.* Pearson, who largely wrote the column and was the original publisher (to NANA) was not sued because, being a non-resident in-

dividual, he was not amenable to process in New Hampshire. The underlying arrangement between Pearson, NANA and newspapers such as Monitor, was as follows (See 106 N.H. at 95, 96, 97-98):

> "The Pearson column was received by the defendant [NANA] in its New York office where it was stenciled and mimeographed and shipped to subscribing newspapers on the East Coast. ***The defendent acted as agent for authors . . . and its duties were to sell the particular feature for the author and make an accounting to him. ***Under this contract Pearson agreed to indemnify the defendant against damages arising out of libel. . . . Pearson was paid a guaranteed amount plus a percentage of the revenue from sales to newspapers by the defendant. ***The defendant could reasonably anticipate that the sale, distribution and promotion of the Pearson column . . . might entail libel actions as its contract with Drew Pearson for indemnification attests."

Under this contractual arrangement (the contract is Exhibit 21 in this case and material excerpts are attached hereto as Appendix A), Pearson was free to write what he pleased, NANA was under no contractual obligation to investigate the facts, and while it might question Pearson, Pearson had the final authority for column content, and NANA could refuse to publish only in violation of its contract; it was protected by the indemnification agreement.

Because of this situation, the Trial Court ordered counsel for Petitioners to advise whether Pearson was in fact controlling the case as the real party in interest defendent [so that, for example, his "actual malice" would be chargeable to the named defendants below, the Petitioners here], but counsel successfully avoided compliance with this order by reporting inability

to determine the fact (See. T. 1-144 to 155).[1] As a result the indemnification feature of the contract was excluded from jury consideration (T. 8-159, Exhibit 33; T. 8-92, 93). As a further result, the Trial Court held that neither NANA nor Monitor was chargeable with Pearson's reckless disregard for truth or falsity, although allowing both to claim reliance on Pearson as a responsible reporter.

The Petitioner Monitor, unlike NANA, was free to refuse to publish defamation, and was in a position to check the facts alleged by Pearson with regard to New Hampshire matters. Thus the two Petitioners were treated somewhat differently at the trial below.

2. *The jury trial and appeal*:

The cause was tried to a jury, *Morris J.*, presiding, starting on December 5, 1966, with verdicts against both Petitioners being returned after 14 trial days, on December 22. The cause was argued on appeal to the New Hampshire Supreme Court in February 1969, with the decision complained of here resulting.

Statement of Facts

1. *Alphonse Roy's reputation*:

Alphonse Roy, 69 years old when this case was tried (T. 7-62), in September of 1960 had a good general reputation as a realtor and public servant who had held responsible public offices. Born in Canada, he was reared on Manchester's West Side with little formal education, but was self-educated while

---

[1]In seeking an extension of time in this Court counsel for Petitioners notified the Court (Mr. Justice Brennan):

"From the outset of this litigation, Mr. Pearson controlled the action as a result of an agreement by which he undertook to indemnify the petitioners against any judgment that might be entered in favor of the plaintiff, the late Alphonse Roy."

working as a textile mill worker (T. 7-62 to 65). He was elected a Representative to the New Hampshire General Court in 1924, 1926 and 1928. He was elected as Alderman of Manchester, this State's largest city, in 1931; as a member of the Governor's Council (the second highest State elective office) in 1932 and re-elected to that office in 1934. He was elected Congressman in 1936 in the disputed Jenks-Roy election, and was his Party's unsuccessful candidate against Jenks in 1938 and 1940. (T. 7-142).

In 1943 Roy ran unsuccessfully for the nomination for Sheriff of Hillsborough County, in 1944 he ran again and after having apparently won, lost in a recount. He was then, in 1945, named U.S. Marshal for the District of New Hampshire in which post he served two terms until 1953. He then ran unsuccessfully for Mayor of Manchester in 1954 and for Register of Deeds in 1956. In 1958 he was his Party's nominee for Congress, but lost to the Republican in the general election. (T. 7-154).

Thus Roy, in 1960, had been a responsible public officer and Democrat politician for 36 years. He had never been charged with *any* criminal act in his entire life, either as an adult or as a minor. On September 10, 1960 Pearson's column referred to Roy as:

> "a former small time bootlegger".

2. *Genesis of the September 10, 1960 column:*

Pearson threw this charge at Roy in a specially timed column written to assist another Democrat, Herbert Hill, who was a primary opponent of Roy's in a three-man race for nomination as the Democratic candidate for U.S. Senate. The bootlegger charge was wholly false and unrelated to the political story being written, which was also, insofar as it impugned Roy, wholly false. This is what the evidence showed:

In 1960 Roy decided in the spring to become a candidate for the Democratic nomination for Congress, and actually filed for that office on July 18. He subsequently, on July 25 withdrew from that race and filed for U.S. Senate (T. 7-171).

While intending to become a candidate for Congress, sometime before July 6, Roy called Ralph LaVallee to solicit his political support. At that time LaVallee was Superintendent of the Hillsborough County Farm and was Democratic Town Chairman in Goffstown. During the telephone call LaVallee told Roy that Frank Sullivan was at the County Farm, and when Sullivan would be released. Who brought the subject up —Roy or LaVallee—was subject to conflicting memories (T. 7-176 to 185; T. 5-213 to 216).

A small group of Democrats, returning from the National Convention in 1960, decided to get the "best" ticket of New Hampshire candidates possible to assist their Presidential candidate John F. Kennedy (T. 3-26 to 37). They assumed the validity of a thesis that Democrats in New Hampshire must present a "balanced ticket" with a Franco-American, an Irish-American and a Yankee (whatever that is) as candidates for the three top spots of President, Governor and U.S. Senator. Bernard Boutin was their choice for Governor, so, with Kennedy the Presidential Candidate, they needed a "Yankee" candidate for the Senate. (T. 9-44, T. 3-26; T. 4-61). Herbert Hill, an amiable Dartmouth College history professor was the candidate selected.

On the last day for filing, July 28, three candidates in addition to Roy and Hill appeared: all were residents of Manchester (as was Roy), and two at least were Irish by name. All three had minor criminal records. See Exhibits 18, 19. They were Frank Sullivan, one Robinson, and one McCarthy. Frank Sullivan had previously been a candidate for office on several occasions, having been nominated by the Democrats for Congress (T. 6-21 *et seq*); he filed because he disliked Hill (T.

6-53) and thought he could win (T. 6-35, 55). Robinson and McCarthy were political "unknowns".

Professor Hill's campaign manager was Joseph Millimet (T. 3-17, 88) but Joseph Scott was doing the work (4-19). The Hill campaigners reacted swiftly to the influx of "non-Yankee" candidates for Senate.

On July 30 Mr. Millimet filed a petition with the Ballot Law Commission seeking to disqualify Sullivan, Robinson and McCarthy as "straw candidates".

On July 31 the Democratic State Committee was harangued that *Roy* had procured the filing of the "straws", and the State Committee announced that Hill was the only qualified candidate and that the rest (including Roy) were not qualified (T. 9-102 to T. 104, 110).

Sometime shortly after July 28 (presumably before August 4) Mr. Scott *claimed at this trial* to have met Sullivan on Elm Street in Manchester and to have chided him for having filed; whereupon, according to Scott, Sullivan pulled out a roll of bills as big as a man's fist and said "Well, see what I got for it", explaining that Roy paid him to file as a straw (See T. 4-129 to 134). [Scott had never told this before (T. 4-132, 134) and Sullivan emphatically denied the story (T. 6-36, 37)].

Mr. Millimet tried the Ballot Law Commission proceeding August 3 and 4, without calling Mr. Scott, although attempting to prove that Sullivan and the other two were straws, and believing that Roy had arranged their filing (See Exhibit 12, T. 3-47 to 80, 95, 96, 119, 120, 130).

The ballot Law Commission ruled Robinson and McCarthy off the ballot as straw candidates, but left Sullivan on, so that the final slate of candidates consisted of Hill, Roy and Sullivan [and they finished in that order, with Senator Bridges defeating Hill in the general election].

The Democratic State Committee's endorsement of Hill on July 31, Roy's reply in kind castigating the State Committee and Hill, and the Ballot Law Commission's hearings and rulings received wide attention in the New Hampshire press, all *during the period July 30 to August 5* (See Exhibits 11, 13, D, E, F).

Some three weeks later Drew Pearson telephoned Manchester trying to locate someone in the Hill campaign to inform him whether a Fulton Lewis report that Kennedy was financing Hill with Fifty Thousand Dollars was true (T. 4-10, 11). Scott called back August 24 (T. 4-53; 5-35), said Lewis was wrong, and told Pearson substantially all of the falsehoods concerning Roy of which complaint is made here, except the call to LaVallee; that is, in addition to the "bootlegger" report, he told Pearson that Roy had procured the straws including Sullivan, and was assisting Bridges in this effort. Scott said also that he told Pearson *he had no evidence* that these "straw" charges were well-founded (T. 4-56 to 65).

Pearson and Scott made an agreement that Scott would supply Pearson with a copy of the Ballot Law Commission proceedings (T. 5-20). Millimet had previously insisted upon introducing the "criminal" records of Sullivan, Robinson and McCarthy as part of that record (T. 4-32). And, although Mr. Millimet never discussed with Scott what Scott was doing with Pearson (T. 4-28 to 30), Scott supplied Pearson with the Ballot Law Commission transcript and photocopies of Millimet's copies of the criminal records (T. 5-37 to 39, compare Exhibits 18A and 19A with 18B and 19B). Thus Pearson was given *record verification* of the criminal records of everyone adversely commented on except Roy, and of the "straw" candidate controversy which resulted in Sullivan *not* being found to be a straw.

Pearson called Scott a second time August 25 or 26 (T. 4-136) and Scott repeated the charges (T. 5-22 to 24). Pearson

called Millimet between August 24 and August 27 (T. 5-44), and Millimet probably discussed "ticket balancing", Hill's chances, and the Ballot Law Commission proceedings (T. 5-44, 45; T. 3-90 to 96, 177 to 180) but said nothing about the LaVallee call, or "bootlegging", because he knew nothing of either (3-15, 16). If he discussed the "straw" and "Bridges" counts with Pearson *he warned Pearson that he had no facts to prove them* (3-95, 96; 178).

Pearson knew and recognized that the sources for this anti-Roy defamation were Hill's poltical managers (T. 5-20, 61). His assistant talked to Senator Bridges but got no information (T. 4-12).

Pearson also called Ralph LaVallee between August 24 and August 27, and injected Bridges' name into the call as indicated in the published column (T. 5-59). LaVallee and Roy were both emphatic, as was LaVallee to Pearson, that Bridges' name did not come up (T. 5-216; 7-185). There was evidence that national columnists "throw in a big name to attract attention", and that Bridge's name would attract attention to the column whereas Roy's name would not (T. 9-48 to 50).

With *possibly* a further talk with one of his staff men, Fernsworth (T. 5-15 to 17, 48), this was Pearson's investigation of the "straw" and of the "Bridges" counts, and the story was complete August 27. He did not know Scott, Millimet, or LaVallee who were the informants. *He did not check Scott with anyone insofar as the "bootlegger" charge was concerned, and Scott was the sole source of this lie.*

Although the supposed facts were at hand not later than August 27, the story was not written up until September 7, and *was specially timed for publication September 10 "just before the election" of September 13 (T. 5-72, 73). Thus there was a period of 11 days available for checking the facts without impairing the "hot news" value of the libel.*

3. *The bootlegger charge was private factual libel*:

In its opinion below, the New Hampshire Supreme Court correctly synopsized the evidence on the false bootlegger charge, and its view of the issue, as follows (See pp 16-17 of Petition):

> "The evidence fails to reveal that any prosecution for criminal activity of any kind was ever brought against Alphonse Roy. His only brush with the law was in January 1923 when he was taken to the police station after a raid when he was present in a near beer parlor run by his brother. He was not charged with any violation and was released. This was 37 years before the publications here in question. Since prohibition ended in 1934, it is not probable that the bootlegger statement would be understood to refer to any activity within 26 years of the publication. Although there was evidence that there were rumors in the mid-twenties that plaintiff was a bootlegger, it was findable from the evidence that these had died out before he was elected to the Executive Council in 1932.
>
> "Although engaging in criminal activity even such as small-time bootlegging might be difficult to exclude from those things which affect fitness for office if it were alleged to have occurred recently its inclusion as a matter of law becomes less clear with the passage of a long period of time.
>
> "We are of the opinion that small-time bootlegging activity which occurred some 26 or 37 years in the past could be found to have lost its relevancy to prove the present fitness or unfitness of a candidate. The Trial Judge must have made this preliminary determination when he decided to submit the issue to the jury, and the jury must have so found when they determined the defamation to have been a private one."

The evidence not only warranted the jury's conclusion, it virtually required it. Pearson was specific that *"this was reported as a fact, yes"* (T. 5-100), so was Monitor's publisher Jim Langley (T. 2-188). Pearson intended to make *"a factual statement"* (T. 5-102), as distinguished from an editorial comment. He had received this false information by telephone from Scott, whom he had never met and did not know (T. 5-47), and he made no check to verify the report before publishing the information (T. 5-48, 62), *and didn't call Roy to confirm or deny because he expected Roy would deny it* (T. 5-61). Although Pearson had the false information about August 24-26, (T. 5-35), he deliberately delayed publication, and timed release just "before the election" (T. 5-72, 73).

"Bootlegging" was intentionally used and was understood to mean illegal trafficking in liquor during the Prohibition era (T. 5-57, T. 2-175, T. 5-203; T. 6-112, 114, 120; T. 7-24). It was thus a charge of criminal activity. It in fact damaged Roy's reputation, being widely discussed and circulated (T. 2-189; T. 4-142; T. 5-191 to 195; T. 6-88 to 118, 120, 122; T. 7-47, 48, 52 to 56). It also caused Alphonse Roy personal chagrin, shame and mental distress (See T. 7-201 to 220):

> "I was ashamed of myself. I hated to face people, having in mind that people knew that once upon a time I was a bootlegger . . . and I felt that this article . . . had succeeded to poison the minds of thousands of people, and I was really run down and I was hurt, and I felt that way for a long time." (T. 7-219).

Argument

I

The Decision Below Correctly Applied New York Times v. Sullivan to The Facts Shown In This Case.

The narrow issue sought to be reviewed here is succinctly explained and stated in the decision below (Petition, p. 15):

"The case was tried on the basis that since he was a candidate for the United States Senate, publications about Roy would come under the same constitutional protection as where public officials are involved under *New York Times v. Sullivan*, 376 U.S. 254. However, the Trial Court instructed the jury that if they found that the bootlegger publication was a public affair on a par with official conduct of public officials, they were to return a verdict in favor of NANA, and that in considering the case against Monitor they should follow instructions based upon the New York Times rule. He also instructed the jury, that if they found that the bootlegger publication would not touch upon or be relevant to Roy's fitness for public office 'but was rather a bringing forward of the plaintiff's long forgotten misconduct in which the public had no interest, then it would be a private matter in the private sector' and that they should consider the claim against both defendants under the law relating to private libels. The verdict against NANA shows that the jury found the publication to be in the private sector, for under the charge if they found otherwise, they were directed to bring in a verdict in favor of NANA.

"The main issue in the case as it comes to us, therefore, is whether the bootlegger part of the publication could be found to be a purely private defamation and outside the constitutional protections of the New York Times rule which permits recovering only on proof that the publications were knowingly false or that they were false and were published with reckless disregard of the truth."

The specific point at issue here is whether, *in this instance* publishing an unverified, false, obviously defamatory charge of criminal conduct which was thirty to forty years old, against a candidate for public office, was a publication in good faith for a justifiable purpose, or whether it was a publication under

mere color of a lawful occasion, without good faith, where the protestation of acting for a justifiable end is made as a cover and pretense to publish and circulate defamatory material.

> "Where, however, there is mere color of a lawful occasion, and the party, instead of acting in good faith, assumes to act for some justifiable end merely as a pretense to publish and circulate defamatory matter. . . he is liable in the same manner as if such pretense had not been resorted to." (*State v. Burnham,* 9 N.H. 34 at 41, 42, charged in this case at T. 10-147).

This is a question of fact, and was correctly left to the jury's determination.

The jury found that the bootlegging charge was not relevant to Roy's fitness for office, but rather a bringing forward of a long forgotten false rumor in which the public had no interest. The evidence fully justifies that finding. The single fact that FBI checks on Roy in 1945 and 1949 in connection with his being appointed to the post of U.S. Marshal developed no reason to recommend against his appointment to that responsible law enforcement post, justifies the jury's conclusion, see T. 9-117 and T. 7-154 where Attorney Millimet says "*it wasn't a serious thing,* so they would have recommended"!! The witness William Moher, presented by the defense, acknowledged that such rumors as existed 43 to 44 years ago were not current in the 1930's but had died out "long before that". Scott and Shenton, who testified to the contrary were demonstrated to be unworthy of belief, on this and on other items of testimony. The fact that Earley, Suosso, Thirsk, Gauthier, Ryan, Gay and Millimet knew of no such rumors over a period that covers 1926 to 1960 is indicative that no one considered over all these years that there was sufficient substance to the rumor to warrant using it openly. The fact that it was never reported in print, in spite of the 1936 Roy-Jenks battle and the

1944 Sheriff's race, is good evidence that there was no situation here that made this stale rumor relevant to Roy's qualifications for public office.

We would further invite to the Court's attention, that there was no relevancy to publishing the "bootlegger" charge in the September 10 column itself. The thrust of the article, as it related to Roy, consisted of repeating the already disproven charges that he arranged Sullivan's release from jail to run as a straw candidate, together with other straws, as a favor to Bridges in 1960. That story could have been told without throwing in the further gratuitous insult of the bootlegger charge. The bootlegger charge is foreign to the balance of the story, and constituted only a malicious defamation of one of the actors — Roy. (See T. 8-209 to 211). Journalistically, Pearson was discussing others with criminal records, and, to put Roy in the same category, created a criminal record for Roy. See Pearson's explanation, T. 5-56 to 58:

> "I deliberately put in the word 'later'—'later U.S. Marshal'—because in the old days there were many people who were bootleggers. I know some very respectable big liquor dealers today, millionaires, who were bootleggers, but they've gotten over it, lived it down. . . . Here Roy, apparently, if he became a United States Marshal, it was not held against him".... (T. 5-57).

This lame explanation by Pearson would justify the conclusion the jury reached on this issue. Even *he* assumed that the bootlegger charge was irrelevant to the 1960 campaign, but he used it, for no justifiable purpose, in reckless disregard for whether it was true or false, solely to defame Roy.

II

A False Report Of Bootlegging In The 1920's, Made In Disparagement Of A Political Candidate in 1960, May

Properly Be Found To Be Out-Side The Boundaries Of The "Official Conduct" Concept Of New York Times v. Sullivan.

Petitioners do not dispute that the evidence justifies the jury finding; they argue that *Times v. Sullivan,* 376 U.S. 254 (1964), hereinafter referred to as *New York Times,* precludes there being any factual issue. Essentially the Petitioners' position is that if a man stands as a candidate for U.S. Senate *anything* anyone writes about him is privileged. We do not so understand the law.

For the purposes of trial of this case, plaintiff's counsel agreed that Roy as a candidate was within the general concept of "public official" as conceived in *New York Times,* but at no time did the plaintiff's counsel agree that the *New York Times* rule governed the case. (See T. 1-94, 95, T. 3-116). This Court had not yet ruled that candidates for public office were within the "public official" concept, rather than being "public figures" as conceived in *Curtis Publishing Co. v. Butts,* 388 U.S. 130, (1967), but we preferred not to be required to try the case again should this Court go that far.

The *New York Times* rule, however, has two requirements. It is only defamation (1) of a "public official" (whatever that may mean), (2) concerning his "official conduct" (whatever that may mean), that is protected. The type of publication toward which the constitutional protection is extended is "*criticism of official conduct.*" The rule is:

> "A public official [cannot recover] damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' —that is, with knowledge that it was false or with reckless disregard of whether it was false or true." (376 U.S. at 279, 280).

In footnote 23 (376 U.S. at 283) the Court goes on to say:

> "We have no occasion here to determine [1] how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule. . . . Nor need we here determine [2] the boundaries of the 'official conduct' concept."

Thus it is made clear that there are limits to both branches of the *New York Times* rule, and that *"there are boundaries" of the "official conduct" concept.*

Our case of *Baer v. Rosenblatt,* 106 N.H. 26 (1964), was reviewed on certiorari for the express purpose of further defining the concept of "public official", *sub nominee Rosenblatt v. Baer,* 383 U.S. 75 (1966) (see footnote 12), without any consideration being given to the "public conduct" concept, because the libel was obviously related to Baer's supposed conduct in the employment he held. The case was remanded for trial because on the record already made, it was apparent that *the case might fall outside of the New York Times rule,* and that even if it were governed by the *New York Times* rule "respondent may be able to present a jury issue of malice as there defined" (383 U.S. 87). The Court went on to "remark" that it was for the trial judge "in the first instance to determine whether *the proofs show* respondent to be a 'public official' (italics added)."

After remand, the case came again before the New Hampshire Supreme Court for decision, in *Baer v. Rosenblatt,* 108 N.H. 368 (1967), on the question whether the issue of "public official" was triable to the "trial judge" or to the jury, since plaintiffs have the right to jury trial of defamation actions under the Constitution of New Hampshire. The New Hampshire Court held that the issue was one of fact, and consequently was for the jury (108 N.H. at 370). The Court went on to rule, correctly, that *"The burden of establishing a privileged occasion is upon the defendant,* Prosser, Torts (3d ed) *s.* 110."

Now, if proof of the existence of a "public official" status is

factual, it seems equally clear that whether or not a false defamatory publication is within or outside of the "boundaries" of reports of "official conduct" is similarly an issue of fact to be decided on evidence.

Belli v. Orlando Daily Newspapers, Inc., 389 F. 2d 579 (1967) was disposed of by the Fifth Circuit precisely in this manner, and certiorari was denied by this Court on October 14, 1968 in No. 96, *Orlando Daily Newspapers, Inc. v. Belli.* In the *Belli* case the defendants published in a gossip column (Is Pearson's column anything else?), a 9 year old false story that Belli had "taken" the Florida Bar Association by charging hundreds of dollars worth of clothing to his hotel bill, which the Bar Association had agreed to pay in consideration of Belli's appearing on a panel at its meeting. Among the defenses asserted was the claim that Belli was a "public figure" (which was acknowledged by the Court) and that the item qualified under *Sullivan* and *Butts* as comment on his "official conduct." The Fifth Circuit reversed a lower court dismissal, and remanded the case for trial to jury. *Wisdom, J.*, speaking for the Court, said:

> "Not only must Belli be considered a public figure before the defendants can avail themselves of the *New York Times* privilege; *the matter covered by the publication must be of legitimate and substantial public interest. Thus a court* confronted with a defamation suit in which the defendant asserts the New York Times privilege *is compelled to make a dual inquiry* (1) whether the plaintiff is a public figure and (2) *whether the alleged defamatory publication is directed toward his public conduct****We conclude, therefore, that *the trial court is the proper arena for development of the relevant facts and resolution of the crucial issues in the first instance.*" (389 F. 2d 587, 588, italics added).

The Court went on, by footnote 15, to cite *Rosenblatt v. Baer's* "remark" as authority for this disposition.[2]

Insofar as this Court's "remark" in the *Baer* case that it is for the "trial judge" "in the first instance" to determine the issue is concerned, the "trial judge" in this case did so: he determined in the first instance that *findably* the "bootlegger" charge was not relevant to Roy's candidacy, and correctly left it to the jury to determine *on the facts* whether or not the charge did bear on Roy's fitness as a candidate. This is the correct disposition of a disputed fact issue.

Plaintiff's position was made known at the outset below that there was no useful purpose in publishing in 1960 false gossip about a man in 1920 or 1930, and the relevance of Pearson's doing so to the issue of malice that destroys privilege was pointed out, (See T. 1-24), and maintained throughout trial (See T. 8-209 to 211, R.C. 18-12 to 26). The defense posture itself recognized that this was a dragging in of an irrelevant matter so old as to be without significance (T. 1-111, 112; see also T. 1-88; T. 7-84, 142), and Langley could think of no relevant purpose for this aspect of the publication (T. 2-161).

This particular aspect of libel law—"the color of lawful occasion" subterfuge of character assassinators—has not yet been directly reviewed by this Court. In *St. Amant v. Thompson*, 390 U.S. 727, which is the most recent decision in the field, there is language which indicates that this Court recognizes that irresponsible publishers will take such advantage and

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[2]In addition to *Belli v. Orlando Daily Newspapers, Inc.*, the following cases similarly appear to recognize a factual issue as to the extent of the "official conduct" concept of *New York Times v. Sullivan*: *St. Amant v. Thompson*, 390 U.S. 727; *Goldwater v. Ginzburg*, 261 F. Supp. 784 (S.D., N.Y. 1966); *Tucker v. Kilgore*, 388 SW 2d 112 (Ky. 1964); *Eadie v. Pole*, 91 N.J., *Super* 504, 221 A2d 547 (1966); *Keogh v. New York Herald Tribune, Inc.*, 51 Misc. 2d 888, 274 NYS 2d 302 (1966); *Cabin v Community Newspapers, Inc.*, 27 App Div 2d 543, 275 NYS 2d 398 (1966); *People v. Mager*, 25 App Div 2d 363, 269 NYS 2d 848 (1966).

attempt to claim *New York Times* protection, and that in such cases the jury need not believe their protestations. The following excerpt, we feel, applies generally to this case:

> "*The finder of fact must determine whether the publication was indeed made in good faith.* Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call." (390 U.S. at 732, italics added).

Here we see this Court recognizing the *good faith* of the publisher of libel is a question of fact, and that his professions of good faith need not be believed.

This case is a good illustration of the usual situation that prompted the New Hampshire Court as early as *State v. Burnham,* 9 N.H. 34 and *Palmer v. Concord,* 48 N.H. 211, to recognize that the existence of a "lawful occasion" to publish depends upon the actual, factual *motives* of the publisher:

> "*A court cannot rule* that a communication is privileged without assuming the conditions on which it is held to be privileged, namely, that it was made in good faith, for a justifiable purpose. . . ." (*Palmer v. Concord* at 217).

This rule has been uniformly followed in New Hampshire through *Lafferty v. Houlihan,* 81 N.H. 67 to *Baer v. Rosenblatt* 196 N.H. 26. While *New York Times* carved out an area—"official conduct of public officials"—where it superimposes its First Amendment protection—in point of fact no case has yet been presented to this Court in which the existence of the lawful occasion on which the privilege is based was challenged. This case is therefore of first impression insofar as that aspect is concerned.

If we assume, *arguendo*, that Pearson's retelling the story of the straws and Bridges was germane to the 1960 campaign as a report (albeit a false one) of Roy's official conduct as a public candidate, and that the motives of the publishers were to "prevent the election of an unsuitable person to office" (*State v. Burnham* at 41), that does not answer the further question whether bringing forward a stale false rumor of bootlegging was also germane. Roy's conduct *as a candidate in 1960* may be admitted to be "official conduct" under *New York Times*. His supposed conduct as a private citizen in 1923 was as clearly not official conduct. Throwing the false 1923 "bootlegger" charge into the 1960 story was needless, heedless and not germane either to the 1960 campaign or to the story being told. As Mr. Justice Fortas said dissenting in *St. Amant v. Thompson*, 390 U.S. at 734, in another connection:

> "The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. ***The public official should be subject to severe scrutiny and to free open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy at law. *New York Times* does not preclude this minimal standard of civilized living."

Roy was, in this case, "needlessly, heedlessly, falsely accused of crime." Needlessly because the charge was not germane to the 1960 issues or to the story being told; heedlessly because neither petitioner concerned itself with the truth or falsity of the charge, and falsely on the evidence and finding of the jury.

The writ should be denied.

III

Appellant's Prayer That This Court Summarily Reverse The Judgment Below Concurrent With The Issuance Of The Writ For Which Application Is Made Is Improper.

The New Hampshire Supreme Court sustained the verdicts as proper on the jury finding that the "bootlegger" publication was a private libel, and therefore refrained from reviewing, *as moot*, Roy's contention that the record includes sufficient proof of "actual malice" under the *New York Times* doctrine to sustain verdicts even if the publication were found or held to have been in the public sector.

The record contains ample such evidence, and therefore, even if the judgments being reviewed were thought to be improperly based on the private sector rationale, they should not be summarily reversed, since they are sustainable alternatively because in the trial a sufficient showing of "actual malice" was made out, and on a new trial would be provable again. This aspect of the case is fully presented in Respondent's brief to the New Hampshire Supreme Court at pages 19-33.

This case differs from *New York Times v. Sullivan* and its progeny in that the writer here, instead of being an employee of the publisher to the public (Monitor) was an independent columnist distributing his material through a corporate feature syndicate.

It should be noted that this Court has not yet considered the writings of syndicated columnists in the *New York Times* context. It has held corporate publishers responsible for the malice (i.e., reckless disregard) of employees, and has discussed the reckless disregard of the employee-writer as the reckless disregard of the corporate publisher in *New York Times v. Sullivan, Butts, Walker,* and *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81 (1967). Does the syndicated columnist stand any differently? We say not.

The evidence in this case is clear that NANA had a right to question libel before publishing it, and that newspaper subscribers such as the Monitor had the right to decline to publish

libel sent to them by NANA. The evidence is also clear that Pearson controlled the content of the column and indemnified the Petitioners against libels originating with him. That Pearson and NANA were joint venturers in the sale of the column is apparent from the contract which is Exhibit 21.

Under these circumstances, when these Petitioners assert a conditional privilege to defame, the malice of the writer, Pearson, defeats the claimed privilege, and in that sense *is* imputed to the publishers, because the publishers are jointly liable with the writer. See Annot. 10 ALR 672 (1921).

> "Whenever two or more persons cooperate in the publication of a libel, all are responsible for the resultant damage. . . . ***But of course, there must be some degree of concert between the defamers; if they acted independently, they are not liable jointly.***
>
> *"Where the liability of one person for a defamation published by another is predicted upon the rule of respondeat superior, as in the case of master and agent, or principal and agent, the parties are jointly liable."*

33 AM. JUR., *Libel and Slander*, § 198 at 186-88 and authorities cited; and see *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260.

The release of the September 10 column to the newspapers by NANA constituted a ratification of Pearson's acts in writing it, and since NANA and Pearson were joint venturers, NANA is legally chargeable with Pearson's reckless disregard. *See generally, Annotation, Liability of Master Or Principal For Servant's Or Agent's Libel*, 150 ALR 1338, 1349 (1944).

Pearson, referred to as the "Garbage Man of the Fourth Estate" in other litigation (*Pearson v. Fairbanks Pub. Co.*, 413 P 2d 711 (Alaska 1966) is not an apparently reliable source of information, nor is his column comprised of purely news items. Insofar as NANA is concerned, Pearson himself testified that *questions of libel arise almost daily* with regard to this

column, so that the New Hampshire Court correctly commented that this Petitioner *"could reasonably anticipate"* that libel actions would arise from its sale and distribution of the column (106 N.H. at 97-98). In this instance the "bootlegger" charge was a "red flag" appearing on the face of the matter published which cried out for verification in order to guard against obvious injury if the report were published and proved false. Hence the exception to the general rule illustrated by *Layne v. Tribune Co.*, 108 Fla. 177, 146 So. 234, 86 ALR 466 (1933) has no application here.

We would therefore urge, if the writ issues, that this Court rule that Pearson's malice (i.e. his reckless disregard) be charged to his indemnified agent NANA.

The importance of this point lies in the fact that professional character assassinators such as Pearson, operating behind buffers such as NANA, deprive plaintiffs of local jurisdiction for suit, except suit against the local newspapers and NANA, as was the situation here. If the system of dissemination of libel used here is allowed to insulate both the writer and publisher, by compartmentalizing the conduct of each member of the disseminating group, justice is defeated.

The reckless disregard of the writer *plus* the reckless disregard of NANA are chargeable to NANA. The reckless disregard of both Pearson who wrote it and NANA who distributed it are chargeable to the Monitor which published it, in addition to the Monitor's reckless disregard. The situation here is no different than the products liability situation of the manufacturer, distributor and salesman of a defective appliance that causes harm. The original defect (false defamation recklessly written) of Pearson, uncorrected by NANA (which could have but did not insist upon deletion), and uncorrected by Monitor, (which could have but didn't verify) all contributed to cause the harm: since Pearson and both Petitioners acted in concert, they are all chargeable with the liability acts of each

other, and Pearson's reckless disregard is chargeable to both Petitioners.

We contrast this case with other recent cases in the *New York Times v. Sullivan* line assuming that Pearson's conduct was properly chargeable to these indemnified Petitioners below:

In *New York Times v. Sullivan* the publisher of defamation was excused from liability because it relied upon the "good reputation" of endorsers of the ad *who were known to it,* the ad not being obviously defamatory of any individual.

New York Times v. Connor, 365 F 2d 567 (1966) excused the publisher of defamation, commenting that Salisbury (the writer) had relied on one or two persons as sources for each item, and *did* contact persons of differing points of view, and made a conscientious effort to contact Connor and others on the opposite side.

In *St. Amant v. Thompson,* 390 U.S. 727 (1968) St. Amant, who uttered the defamation over television quoting one Albin, had known Albin for months, had verified other aspects of the Albin information and had affidavits from others. Albin had given St. Amant a written affidavit and had sworn to his answers before newsmen, saying he was prepared to substantiate what he said.

In these three cases, this Court and the Circuit Court saw no evidence of reckless disregard.

In *Rosenblatt v. Baer,* the writer Rosenblatt telephoned a CPA and Chairman of the Belknap Area Commission, whom he knew, and got data on which he claimed he wrote the defamation; this Court said of this case "respondent may be able to present a jury issue of malice as [defined in *New York Times*]", 383 U.S. at 87, and remanded the case for trial.

In *Goldwater v. Ginzburg,* 261 F. Supp. 784, 787 (S.D. N.Y., 1966) the District Court remanded the case for trial say-

ing that there was evidence on which malice could be found by the jury, including the fact that:

> "Ginzburg had information about the "nervous breakdowns' . . . from one source only, and did not know whether or not the source had the information from personal knowledge."

In *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 157 the publisher of defamation relied on the affidavit of an informant who had overheard a telephone conversation "without substantial independent support", and this Court upheld the plaintiff's verdict on the basis that the "slipshod and sketchy investigatory techniques employed in checking the veracity of the source" constituted "reckless disregard" in the opinion of the then Chief Justice, or a "departure from standards of press responsibilities" severe enough to cause loss of constitutional protection, in the opinion of Mr. Justice Harlan.

In these latter cases, issues of fact were acknowledged to exist, even though First Amendment protection was involved.

The instant case, insofar as Pearson's conduct is concerned, is in the latter category with *Baer, Goldwater,* and *Butts.*

Pearson here relied, for the bootlegger charge, on two telephone calls to a person whom he did not know, had never met, and whose reputation for truth and veracity was totally unknown to him. In this trial we have demonstrated that the informant, Scott, is not credible. On the contrary, he fabricates at will.

Pearson knew Scott was a biased source. *He knew also that Scott was prone to make charges with regard to which Scott had no proof,* since Scott told him he had no proof on the "straw" and "Bridges" charges. He therefore called Millimet to verify Scott on the "straw" and "Bridges" charges, and again was told *there was no proof* that Roy was involved.

Pearson was then supplied with the Ballot Law Commission transcript and the criminal records of Sullivan, Robinson and McCarthy, *but no proof that Sullivan was a straw, or that Roy had procured his filing, or that Bridges was involved.* He published the straw and Bridges charges just the same, and this, we submit, is reckless disregard for whether the charges were true or false.

With regard to the bootlegger charge, Pearson's reckless disregard is even more obvious, since he had no verification at all and sought none. In contrast to Salisbury in *Times v. Connor,* who sought to get the other side by trying to contact Connor, Pearson *deliberately* failed to contact Roy:

> "From long experience . . . if he's in an embarrassing position, he usually denies it." (T. 5-61).

Failure to check sources, "or such failure to check for the purpose of avoiding finding of the truth" constitutes "reckless disregard" in the constitutional sense. *Cepeda v. Cowles Magazines and Broadcasting, Inc.* 392 F 2d 417, 420 (1968), *cert. denied,* Oct. 14, 1968, No. 256.

We respectfully submit that the evidence on Pearson's conduct in writing and placing in circulation this libel, and particularly the "bootlegger" charge, makes it clear that he wrote with reckless disregard for whether the charge was true or false. He needlessly, heedlessly and falsely defamed Roy "wholly" on information no more reliable than "an unverified anonymous telephone call", *St. Amant v. Thompson,* 390 U.S. at 732.

It is settled law that one who publishes a libel originally uttered by another cannot escape liability on the ground that he merely republished what he received from a third party. *RESTATEMENT,* TORTS, § 578. *New York Times v. Sullivan* does not purport to change that rule. *St. Amant v. Thompson* endorses it.

If the recklessness of Pearson alone is not enough, there is further proof of further recklessness as the libel was processed through NANA and the Monitor.

"Recklessness" is the language of both negligence and criminal law. Petitioners' counsel recognized this below when he posed the question:

> "How careless can you be and still not be recklessly disregarding the truth or falsity of a matter?" (Millimet at T. 8-527).

Defense counsel below also recognized that if NANA relied entirely on its indemnity agreement with Pearson, it would be *findably* recklessly indifferent to the truth or falsity of the defamation (T. 8-204, 5).

How careless can you be without being in reckless disregard? The general law is that you must take *some* care to avoid liability, and a *complete absence of care, or concern,* is what reckless disregard is. The opinions of Mr. Justice White and Mr. Justice Fortas in *St. Amant* make it abundantly clear that *no care* is *reckless disregard*—and the record here indicates no care exercised by NANA.

Plaintiff in this case was prevented from discovering what, if anything, NANA actually did with regard to questioning the article, when NANA's refusal to answer interrogatories directed to this phase of the case was upheld by the Superior Court on the basis that these were matters of defense (T. 193 to 203; T. 10-56). At the trial, defense counsel, reversing the field, produced no evidence on this point, taking the position that the plaintiff had the burden of proof in this area.

As a result, there is no evidence that NANA, although entitled to question Pearson, did so, but there is evidence that NANA did, in this matter and generally, rely on its indemnity agreement. It is also the evidence that the "bootlegger" charge in the article was obviously, on its face, defamatory, and

sufficiently so that any newspaperman would have recognized that it should not be published without verification (See T. 6-131 to 204, T. 9-189 to 216). And, as the New Hampshire Supreme Court observed on the prior transfer, NANA not only *could* reasonably anticipate libel from Mr. Pearson's column, but *did* and protected itself from that danger by the indemnification agreement.

We say that from these facts alone the jury should have been allowed to find reckless disregard, and would have so found if the fact of the indemnification agreement had been made known to them.

This particular factual situation, of the writer of material known to have a potential for libelous defamation indemnifying the agencies which distribute and publish it, and being in position to limit the distribution agency's right both to investigate the facts or to decline to distribute the material, has not been considered by this Court.

Everything that has been argued above with respect to NANA's reckless disregard applies equally to the defendant Monitor. It too could have questioned Pearson; but it was additionally at liberty to refrain from publication, and was in position to verify the report. This latter factor apparently satisfied the Trial Court that the Monitor's failure to act was more reckless than NANA's similar failure.

New York Times v. Sullivan does not hold that failure to investigate cannot supply the evidence of reckless disregard. It held that *in that case* which involved a publication not defamatory of any individual on its face, and with responsible endorsers, failure to investigate *in itself* was insufficient proof. *St. Amant* says no more, and adds:

> "Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." (390 U.S. at 732).

Mr. Justice Fortas, dissenting, observed:

> "Petitioner had a duty to check the reliability of the libelous statement about respondent. If he had made a good faith check, I would agree. . . . But . . . he made no check. . . ." (390 U.S. at 734).

From Monitor's vantage point there were obvious reasons to doubt the accuracy of the September 10 column. It reported that Sullivan was a straw, and the Monitor knew Sullivan had been cleared of that charge. The column also reported that Roy had procured Sullivan as a straw, which the Monitor also knew had been disproved. The Monitor also knew that the charge that Bridges was implicated was untrue. And it knew that Roy had political credentials other than being "a former small-time bootlegger and later U.S. Marshal." Consequently it knew Roy was at least being disparaged, and being falsely accused of the straw and Bridges charges. These facts, independently of the obviously defamatory "bootlegger" charge itself constituted "obvious reasons" to doubt the accuracy of the column as it referred to Roy. This situation raised a duty to investigate before publication of an obviously defamatory report.

The fact that one New Hampshire editor, faced with the obviously defamatory column, and not being willing to investigate, did not publish it, and that another, by merely telephoning, was able to satisfy himself that the bootlegging charge could not be sustained, (See T. 6-131 to 204; T. 9-189 to 216), is some evidence that *minimal care* would result in non-publication. Both of these editors also testified that where an item is *obviously defamatory of an individual*, and the report cannot be substantiated, it is not published. Monitor's publication without verification under these circumstances is reckless disregard.

In *Cepeda v. Cowles Magazines and Broadcasting, Inc.*, 392 F. 2d 417, 420 (1968), *cert. denied* October 14, 1968, No. 256, the Ninth Circuit approved a charge on actual malice as meeting the *New York Times rule*, which

> " . . . included in the concept of malice, reckless or heedless failure to check sources of information, or such failure to check, for the purpose of avoiding finding of the truth."

That Monitor's failure to check was reckless or heedless was findable because of the witness Shenton's testimony that attempted to demonstrate that there was reason to accept the report at the time without checking, which the jury had ample reason to believe was fabricated. Langley said that if there were anything "questionable" in the column Shenton had the duty to delete it. Shenton feigned actual recollection of processing the particular column (which was disproved), and attempted to excuse himself for not recognizing the necessity for checking it by (1) denying that he recognized the defamatory nature of it and (2) by making incredible testimony that *he* had long heard it rumored that Roy *was* a bootlegger. These "protestations of good faith" (*St. Amant*) proved unpersuasive, in light of the abundant credible evidence that no such rumor of bootlegging existed at the times and places he recited; and the defamatory nature of the charge was obvious to everyone.

In summary, insofar as Monitor's reckless disregard is concerned, the evidence was that an obviously defamatory column was received, and published, with no concern at all being given to whether it was true or false, in circumstances where the jury was entitled to find that this corporate Petitioner's agent "in fact entertained serious doubts as to the truth of his publication", and his "professions of good faith" in the face of the "obvious reasons to doubt" the accuracy of the report,

were not persuasive. This is reckless disregard for whether the report was true or false. *St. Amant v. Thompson,* 390 U.S. 727, 732.

Conclusion

We submit that the decision of the New Hampshire Supreme Court correctly ruled that the jury's finding that the "bootlegger" libel was a private libel outside the "official conduct" concept of *New York Times v. Sullivan* was proper on the evidence in this case. For that reason, the writ should be denied. But if the writ issues, the Court should review *Respondent's* contentions that Pearson was shown to have written the libel with "actual malice" which was chargeable to these Petitioners, and which would sustain the verdicts if the bootlegger charge is held to be subject to the *New York Times v. Sullivan* requirements.

Respectfully Submitted,

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APPENDIX A

Excerpts from Exhibit 21, an agreement between Drew Pearson and Bell Syndicate, Inc., which, it was stipulated below, was in force at the time of the libel, North American Newspaper Alliance, Inc., having succeeded to the interest of Bell Syndicate, Inc.:

MEMORANDUM OF AGREEMENT made this 14th day of June, 1956 between Drew Pearson of Washington, D. C., hereinafter referred to as "the Author" and The Bell Syndicate, Inc., a corporation organized under the laws of New York, hereinafter referred to as "the Syndicate".

FIRST: The Author agrees to write and deliver or cause to be delivered to the Syndicate seven (7) columns each and every week during the period of this Agreement, and any renewals thereof, of the same standard and quality as the column heretofore written by him under the title "Washington Merry-Go-Round" on local, national and world events and affairs, economically, politically and otherwise and grants to the Syndicate the exclusive first publication rights thereto in newspapers throughout the world.

SECOND: The Syndicate agrees to devote its best efforts to secure newspaper publication of the column throughout the world and agrees to pay to the Author. . . . in weekly or monthly installments as the Author may direct.

FOURTH: The Syndicate agrees to file the daily releases for copyright at its own expense in the name of the Author and all property rights in the column, other than the first publication rights in newspapers, shall belong to the Author.

FIFTH: The Author agrees not to release anything for publication in the newspapers directly or through any other syndicate or agency during the period of this agreement without permission of the Syndicate.

EIGHTH: It is understood and agreed that the Author is to indemnify and hold harmless the Syndicate against all court costs, damages and judgments incurred by it by reason of the publication of the column arising out of infringement of copyright, libel, violation of civil rights or other legal liabilites, but that each party shall defray their own attorney's fees in the defense of any suit, provided, however, that the Author shall have the right at his discretion to retain legal counsel to defend the Syndicate, at his own expense.

NINTH: This agreement shall be in force and effect for a period of five (5) years from the 13th day of December 1957, with the understanding that after the expirtaion of the first two (2) years of this agreement, that is, after December 12, 1959, if the gross sales of the column, at any time, not be sufficient to protect the Syndicate against loss in producing and handling the column, then and in that event, the Author agrees to reduce the amount guaranteed by the Syndicate to such extent as to protect the Syndicate against loss during the balance of the term of this agreement. In this connection, the cost of handling and producing the column to the Syndicate shall consist of the cost of postage, wire time and stenciling; but it is understood and agreed that these costs shall not include editorial work or any administrative or selling costs incurred by the Syndicate. It is further provided that upon the giving of ninety (90) days notice by the Author to the Syndicate, the Author may terminate this contract on the first day of said year which succeeds the preceding year in respect of which the Author has received....

TENTH: The Author shall have the right to assign this contract to a partnership or company in which he is the dominating person or controlling shareholder. Such assignment shall not relieve the Author of his liability under the contract.

In witness whereof....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 891

MONITOR PATRIOT CO., NORTH AMERICAN NEWSPAPER ALLIANCE, INC., *Petitioners,*

v.

ROSELLE A. ROY, Executrix of the Will of Alphonse Roy, *Respondent.*

On Writ of Certiorari to the Supreme Court of New Hampshire

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Supreme Court of New Hampshire, reported at 109 N.H. 441, 254 A.2d 832 (1969), was handed down on June 30, 1969 (A. 411-416).

JURISDICTION

By order dated October 15, 1969, Mr. Justice Brennan extended the time in which to file the petition for certiorari to November 27, 1969. The petition for certiorari was timely filed and docketed on November 28, 1969, and was granted on February 24, 1970. Jurisdiction is vested in this Court under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

QUESTION PRESENTED

Whether, in the absence of actual knowledge or reckless disregard of falsity, the publisher of a statement that a candidate for high elective office was a "former smalltime bootlegger" is protected by the Constitution from a libel judgment based on a jury verdict returned under instructions that if the jury found that the statement pertained to the candidate's distant past and thus had no bearing on his present qualifications for office, then the publisher was liable unless he spoke the truth with good faith and for a justifiable purpose.

STATEMENT OF THE CASE

In August 1960, the late political commentator, Drew Pearson, armed with a background report prepared by an assistant, began to investigate an alleged impropriety in the primary campaign of one Herbert Hill for the Democratic nomination for United States Senator from New Hampshire. (A. 146-48.)

Conversations with Joseph Scott, an experienced politician (A. 90) working in Hill's campaign, turned Pearson's interest away from Hill and toward his opponents (A. 90, 152-53).

Pearson learned from Scott that two of the four opponents who had originally filed against Hill had been disqualified as "straw"[1] candidates by the New Hampshire Ballot Law Commission. (A. 152-153, 89.) Scott also told Pearson that the two straws and a third candidate, Frank L. Sullivan, not removed by the Com-

[1] Throughout the testimony, it was generally agreed that a "straw" candidate was one who entered a race with no intention of winning, but rather to draw a block of votes from another candidate in order to permit a third to win by a plurality.

mission, had police records for recurring minor infractions. (A. 156-157, 158-159, 167-168; Pl. Exs. 18, 19; R. V 41, 43.)

Scott further disclosed that Hill's fourth challenger, one-time United States Marshal and plaintiff below, Alphonse Roy,[2] was, as a matter of general knowledge, a former bootlegger. (A. 83, 88-89, 125, 154, 162.) Scott related at least one episode in which he encountered Roy in a speakeasy. (A. 162.) Scott said that Roy had procured the other three Hill opponents as straws and that he suspected that Roy did so in cooperation with the then Senator Styles Bridges, the Republican incumbent. (A. 88-91, 154-55.)

Pearson also talked with Joseph Millimet, Hill's campaign manager, who corroborated much of Scott's information. (R. 162-163.) Particularly, Millimet confirmed the details of the Ballot Law Commission hearings and pointed out that two of the opponents had no campaign organization and that Roy had negligible campaign expenditures and no contributions. (A. 160-161.) Pearson thought that his assistant had also confirmed the bootlegger report. (A. 148-149.)

For further verification, Pearson spoke with the keeper of a correctional farm where Frank Sullivan, one of the primary opponents, had been incarcerated on a drunkenness charge prior to his entry in the primary. (A. 156, 202-203.) Pearson discovered that Roy had called the keeper to inquire when Sullivan would be released. (A. 156, 202-203, 278.) Sullivan's sentence did in fact expire before the July 27 deadline, on which date he filed. (A. 213.)

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[2] Roy died after the trial, his estate was substituted and is respondent here. For simplicity, the "respondent" hereafter refers to Roy.

On the basis of the information he had uncovered, Pearson wrote the article which is the subject of this lawsuit. (A. 176.) The article was scheduled for publication on September 10, three days before the primary and, following its usual procedure, Pearson's office sent it to his distributor three days before the publication date. (A. 176-177, 182.) The article, reproduced in full in the appendix hereto (A. 395-398), read in relevant part as follows (A. 396-398):

Political Snafu

Rock-Ribbed Republican New Hampshire, whose ex-Gov. Sherman Adams was top kick in the White House for years and whose Sen. Styles Bridges is still top kick on the GOP side of the Senate, is so fouled up in a primary snafu that the state may go Democratic this year. The primary verdict is due next Tuesday.

Even that able Senate stalwart, Styles Bridges, is restirring [sic] himself. He has nothing to worry about from his Republican opponent, but the Democrats have put up a dynamic Dartmouth professor, Herbert Hill, against him. The professor came within 11,000 votes of defeating Sherman Adams, lately of vicuna-coat fame, in the 1948 gubernatorial race.

Curiously, the Democratic primary has been cluttered with a motley assortment of candidates who have challenged Hill for the privilege of running against Bridges. That sly, old Republican disclaims any connection with it, but he appears pleased over the muddying of Democratic waters.

One of Hill's primary opponents Frank L. Sullivan, was released from the Grasmere County Work Farm just in time to file for the Senate. With a police record of no fewer than 19 convictions for drunkenness since 1945, he was serving his latest 90-day sentence.

Curious Call

To make sure he would get out in time to run for the Senate, a former small-time bootlegger and later U.S. Marshal, Alphonse Roy, telephoned the Grasmere warden about Sullivan.

Ralph LaVallee in charge of Grasmere, admitted to this column that he had received a telephone inquiry from Roy as to whether Sullivan would be released in time to file. But the warden denied another report that Roy had announced he was calling "on behalf of my friend Styles."

"I don't want to get implicated in anything like that," said La Vallee. "Roy didn't mention Senator Bridges."

Sullivan happily got out of the workhouse in time to run for the most distinguished legislative body in the world. And who should turn up on the ballot but the same Alphonse Roy who was so eager to get him out of the clink.

Because of the peculiar population division of New Hampshire, the Irish Catholics may be inclined to vote for a Frank Sullivan while the French Canadians could be attracted by a name like Alponse Roy. The effect would be to cut down Herb Hill's chances.

Convicts For Senator

Two other curious candidates, who tried to run in the Democratic primary against Hill, were Harold P. McCarthy who has a record of nine convictions for drunkenness, assault, and brawling, and Clement P. Robinson, Jr., who has a record of six brushes with the law for drunkenness and traffic violations. Robinson also received a 30-day suspended sentence for stealing two power lawnmowers and a conviction for the nonsupport of his wife and three children.

> But at least Professor Hill managed to persuade the New Hampshire Ballot Law Commission into knocking McCarthy and Robinson off the ballot.
>
> The bitterest primary battle, however, is between the two Republican gubernatorial candidates, Gov. Wesley Powell and ex-Gov. Hugh Gregg. Powell not only incurred the ire of Vice President Nixon last winter by riding in front of Nixon in the GOP parade through Manchester, but is also antagonizing staunch Republicans by throwing longtime GOP stalwarts out of state jobs in an attempt to build up a personal Powell machine.
>
> Bernard L. Boutin, ex-Mayor of Laconia who is running for governor on the Democratic ticket, may emerge as the final victor after the smoke has settled.

Pearson's distributor, corporate predecessor to petitioner North American Newspaper Alliance (hereafter "NANA"), forwarded the column to subscribing newspapers around the country. (A. 172, 181-182.) No evidence was adduced at trial to show what independent verification NANA undertook or what knowledge it had or could have obtained concerning the statements in the article. The agreement between NANA and Pearson allowed it to propose revisions but Pearson had the final word on content. (A. 173, 289-290.)

One of the subscribers to Pearson's column was the petitioner Monitor-Patriot Co., which publishes a daily newspaper, "The Monitor Patriot", for principal circulation in Concord, New Hampshire. (A. 9, 293.) The Monitor usually received the Pearson column a day before publication (A. 13) and it considered itself free to make only stylistic changes (A. 38-39). The disputed column was reviewed by Enoch Shenton, then City Editor of the Monitor. Shenton testified that, except for the Pearson call to the correctional farm, he was personally aware of all the facts, including the

bootlegger representation, set forth in the article. (A. 295-306.) For this reason (A. 303, 306), and because the Monitor had found Pearson accurate in the past (A. 16), and because it was a small paper (A. 12, 293) with divergent news sources (A. 15) and without an historical index file (a "morgue") (A. 32), the Monitor did not launch a separate investigation for accuracy. (A. 15, 39, 303, 306.)

Forty-seven copies of the Monitor-Patriot were delivered for circulation on the date of publication to Roy's home town of Manchester. (A. 294.) He was apprised of the article after the primary election. (A. 259.)

On November 2, 1960, Roy brought this libel action in the Superior Court of New Hampshire against the Monitor-Patriot and NANA alleging three defamations: (1) that Roy was a "former small-time bootlegger"; (2) that Roy procured straw candidates for the primary; and (3) that Roy was covertly and unethically assisting then Senator Bridges in procuring the straws. (A. 1-5.) Trial was held before a jury in December of 1966. (A.1.) Since the trial ultimately narrowed to a disposition of the bootlegger count,[3] the discussion here is limited to that issue.

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[3] The trial court granted NANA's motion to dismiss on all but the bootlegger count, on the ground that there was no showing that NANA was guilty of "malice", as defined in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). (R. VIII 220, 255; A. 369.) Since, as explained *infra*, the court held that the jury could find the bootlegger count outside the ambit of the *New York Times* rule, that count as against NANA was submitted to the jury. (A. 369.) Although all three counts against Monitor were submitted to the jury over defense objections (R. X 55-56, 58, 99, 118-120), the jury by special verdict stated that its entire award against Monitor was on the bootlegger count (A. 394, 410). Accordingly, the New Hampshire Supreme Court's resolution of the case was limited to the bootlegger count. (A. 411-416.)

At the trial, Scott, upon whom Pearson principally relied for the allegedly libelous bootlegger statement, recounted in detail several incidents from which he learned Roy had been a bootlegger. (A. 92-114.) He said that he and Roy were "married into the same family group" (A. 93, 102) and that, in two private conversations Roy had confided in him about his bootlegging activity (A. 92-96). Two former liquor control agents also testified that they had heard talk that Roy was a bootlegger. (A. 206, 309-310.) In addition, the former City Auditor of Manchester testified that prominent officials in City Hall had referred to Roy as a former bootlegger. (A. 307-308, 314-315.) A former opponent of Roy in a 1956 local campaign testified that stories circulated during the campaign concerning Roy having been a bootlegger. (A. 314.) Finally, Enoch Shenton, the Monitor editor who reviewed Pearson's column, recalled receiving frequent reports, as a young reporter covering the State House in the early 1930's that Roy, then holding a State House post, had been a bootlegger. (A. 295-296, 299.)

Roy repeatedly denied at trial that he ever engaged in illicit liquor traffic (*e.g.* A. 257, 314-319) or that reports to that effect ever came to his attention[4] (A. 279). Witnesses for the plaintiff, including Prohibition enforcement agents, disclaimed knowledge of any bootlegging activity by Roy and of rumors to that effect. (A. 207-208, 223-224, 231-232.)

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[4] It was established that Roy's brothers were bootleggers, a fact Roy admitted (A. 280), and that Roy was present during a raid of a speakeasy in 1923 in which one brother was arrested and fined for selling intoxicants. (A. 126-128.) Roy was taken to the stationhouse because as one officer testified, he was "interfering with an officer." (A. 127.) Roy claimed he went at the request of the authorities to dissuade his brother from further dealing in liquor. (A. 280-283.)

The trial court instructed the jury at length. (A. 366-394.) The bifurcated charge distinguished between a "public libel" and a "private libel" with respect to the bootlegger count (A. 370):

> Is it more probable than otherwise that the publication that the plaintiff was a former smalltime bootlegger was a public affair on a par with official conduct of public officials?
>
> As a candidate for the United States Senate, the plaintiff was within the public official concept, and a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office. That is, anything which might touch on Alphonse Roy's fitness for the office of United States Senator would come within the concept of official conduct. If it would not touch upon or be relevant to his fitness for the office for which he was a candidate but was rather a bringing forward of the plaintiff's long forgotten misconduct in which the public had no interest, then it would be a private matter in the private sector.

If the jury found the bootlegger reference to be in the "public sector", the Court, consistent with its prior ruling that NANA had no "malice"[5] instructed the jury to discharge NANA of liability.[6] (A. 373-374.) As for Monitor, the Court instructed that if the jury found the bootlegger count in the public sector, Monitor, to be liable, must have known that the statement

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[5] See note 3, *supra*.

[6] Since under this charge, the jury returned a verdict against NANA (A. 394), it necessarily found the bootlegger count to be in the private sector. See note 3, *supra*.

was false, or must have published it with a reckless disregard for whether it was true or false. (A. 375.)[7]

The Court then proceeded to instruct the jury upon the resolution of the case if it found the statement to be in the "private sector", as follows (A. 375-376):

> [I]f you have decided that it is a private defamation, the plaintiff would be entitled to recover, that is, you would bring in a verdict for the plaintiff in regard to the private defamation unless . . . it is more probable than otherwise that the publication of the defamatory matter was justified or that it was conditionally privileged.
>
> Now, justification is established—and the defendants have the burden of proof, if you are in the private sector, on justification—is established if the facts stated are true and are published with a justifiable motive. That is, there are two issues there: First, whether the published matter is true, and, secondly, whether it is published from a justifiable motive, that is, to give to persons entitled to know the information so that they can act upon it.
>
> * * *

(A. 376-377):

> * * *
>
> When is a conditional privilege established? Well, it is established if the facts, although untrue, were published on a lawful occasion, in good faith, for a justifiable purpose, and with a belief founded on reasonable grounds of the truth of the matter published.

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[7] The Court defined "reckless disregard" as follows (A. 377):

"Reckless in the sense—I would suppose it could be said to be a wanton act, if that would help you, or it could be a state of mind accompanying an act where the actor either paid no regard to its probable harm or injurious consequences or, though foreseeing such consequences, persisted in spite of this knowledge."

(A. 384):

> Of course, with reference to justification, I said there must be a lawful occasion for making the publication. If the end to be attained by the publication is justifiable, that is, to give useful information to those who have a right and ought to know in order that they may act upon such information, the occasion is lawful. Where, however, there is merely the color of a lawful occasion and the defendant, instead of acting in good faith, assumes to act for some justifiable end merely as a pretense to publish and circulate defamatory matter, or for other unlawful purpose, he is liable in the same manner as if such pretence had not been resorted to.

Although these instructions are not distinguished by their clarity, the Court seems to have created two categories of defense in a private libel—truth with justification or conditional privilege. But the constant interchanging of words like "justifiable" scrambles the two categories and the defense of truth, if any, appears to be lost in the confusion.[8]

On petitioners' appeal from the adverse jury verdicts of $10,000 against each petitioner (A. 394), the New Hampshire Supreme Court affirmed by holding in relevant part (A. 414, 415):

> We are of the opinion that the constitutional protections of *New York Times* v. *Sullivan* and later cases do not extend to all statements about public officials or candidates for office, but only to those which relate to their official conduct or fitness for office, and that there may be purely private libels against such persons which will be governed by state law, unrestricted by the Federal Constitution.
>
> * * *

[8] This matter, however, is immaterial to the position we take in this case.

Although engaging in criminal activity even such as small-time bootlegging might be difficult to exclude from those things which affect fitness for office if it were alleged to have occurred recently its inclusion as a matter of law becomes less clear with the passage of a long period of time.

We are of the opinion that small-time bootlegging activity which occurred some 26 or 27 years in the past could be found to have lost its relevancy to prove the present fitness or unfitness of a candidate. The Trial Judge must have made this preliminary determination when he decided to submit the issue to the jury, and the jury must have so found when they determine [sic] the defamation to have been a private one.

That is the decision petitioners seek to review here.

SUMMARY OF ARGUMENT

I

The decision is *New York Times Co.* v. *Sullivan* and related cases clearly prohibit a candidate for public office from recovering damages for a defamatory falsehood relating to his fitness for office unless he proves the statement was made with actual malice, i.e., with knowledge that it was false or with reckless disregard of whether it was false or not. The question in this case is whether a jury is permitted to find a libelous statement relating to a candidate to be "irrelevant" to his fitness for office, and thus a "private libel" not constitutionally protected by the actual malice rule.

II

Discussion of a candidate's reputation and fitness for office is at the heart of constitutional free speech. A statement that defames a candidate's reputation is

by its very nature of the highest public concern and consequently cannot be excluded from protected free speech. Uninhibited discussion of a candidate's qualifications is indispensable to informed self-government, a primary object of the First Amendment. Moreover, to restrict discussion in a political campaign to an indefinable concept of "relevant" criticism would result in an insidious self-censorship. Those who would speak out in a campaign would steer far wider of the unlawful zone to avoid the risk that their criticism might later be adjudged "irrelevant". This Court, in defining the line between free and actionable speech, should hold that relevancy is a matter for the electorate and not a basis for curbing public discussion of a candidate's fitness for office.

III

Assuming *arguendo,* that the Constitution protects only "relevant" criticism of a candidate's fitness, a charge of prior illegal conduct is relevant as a matter of law.

IV

To obviate a retrial of this case, it is demonstrated that neither respondent published with actual malice. There was no evidence that NANA acted with actual malice and petitioner Monitor, the proof shows, published in reliance both upon Pearson and upon the personal knowledge of the truth of the statement possessed by its reviewing editor. Nor can the alleged malice of Pearson be "imputed" to either petitioner since that would impose an onerous burden of verification upon the press and, moreover, because the evidence also shows Pearson published without actual malice.

ARGUMENT

I. Introductory

This case presents the question of whether the First Amendment protects from libel judgments all criticism and comment respecting a candidate's fitness for public office or only that criticism and comment which a judge or jury finds to be "relevant" to his qualifications.

In the seminal decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), this Court enunciated the constitutional rule (*supra*, at 279-280) "that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The underlying precepts of the *Times* rule as well as its application to new areas [9] establish conclu-

[9] The *Times* doctrine has been extended in principal decisions by this Court to criminal libel statutes punishing criticism of public officials (*Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Henry* v. *Collins*, 380 U.S. (1969)), to invasion of privacy judgments which restrict the reporting of "matters of public interest" (*Time, Inc.* v. *Hill*, 385 U.S. 374 (1967)), to libel judgments which deter criticism of "public figures" (*Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967)), and to the dismissal of a teacher who undisruptively criticizes his school board (*Pickering* v. *Board of Education*, 391 U.S. 563 (1968)). Although the opinion by Mr. Justice Harlan in the *Curtis* case would relax the constitutional standard of liability with respect to public figures, five Justices either concurring or dissenting in that case voted for the actual malice test as a minimum standard. The above cases and others (*Rosenblatt* v. *Baer*, 393 U.S. 75 (1966); *Beckley Newspapers* v. *Hanks*, 389 U.S. 81 (1967); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968)) have also refined the malice standard by the application to concrete factual patterns.

sively, as the lower courts held here, that the malice standard applies to candidates for public office.[10] The New Hampshire courts, however, decided that the protection of the malice standard, as applied to candidates or public officials, is forfeited if a jury finds a libelous statement irrelevant to fitness for office and, thus, a private libel governed by state law. Whether the scope of the First Amendment, as construed in *Times* and succeeding cases, can be so restricted presents the central issue here.

II. A Libel of a Candidate Is, as a Matter of Constitutional Law, Relevant to His Qualifications

A statement that defames a candidate for office is always in the mainstream of public affairs.

First, the *sine qua non* of effective government by the people is the informed exercise of the franchise. This is the very undercurrent of the *Times* opinion, for the ultimate value of the speech protected there is to augment the recourse vested in the people to replace those entrusted with the power to govern. In *Times*, the Court cites the following cogent argument of Madi-

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[10] *Accord*, *Goldwater* v. *Ginzburg*, 414 F.2d 324 (2d Cir. 1969) *cert. denied* 38 U.S.L.W. 3279 (Jan. 26, 1970); *Pauling* v. *News Syndicate Co.*, 335 F.2d 659, 671 (2d. Cir. 1964) (*dictum*), *cert. denied* 379 U.S. 968 (1965); *Kapellas* v. *Kofman*, 1 Cal. 3d 20, 36-38, 459 P.2d 912, 916 (Sup. Ct. 1969); *Phifer* v. *Foe*, 443 P.2d 870 (Wyo. Sup. Ct. 1968); *Dyer* v. *Davis*, 189 So. 2d 678 (La. Ct. App. 1966); *McFadden* v. *Detroit Bar Assoc.*, 4 Mich. App. 554, 145 N.W. 2d 285 (1966) (candidate for appointive office); *Gilberg* v. *Goffi*, 21 App. Div. 2d 517, 251 N.Y.S. 2d 823 (1964) *aff'd*, 15 N.Y. 2d 1023, 260 N.Y.S. 2d 29 (1965); *see Thompson* v. *Evening Star Newspaper Co.*, 394 F.2d 774 (D.C. Cir. 1968), *cert. denied* 393 U.S. 884 (1968) (proponent of delegation to political convention).

son assailing the Alien and Sedition Act (376 U.S. at 275, n.15):

> Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively. [4 Elliot's Debates on the Federal Constitution, 575 (1876).]

The Court also cited with approval (376 U.S., at 281) the language of the Kansas Supreme Court in *Coleman* v. *MacLennan*, 78 Kan. 711, 724, 98 P. 281, 286 (1908), which involved the denunciation of a candidate:

> It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged.

See Garrison v. *Louisiana, supra* at 76-77. In short, a paramount interest in *Times* is " 'assur[ing] unfettered interchange of ideas for the bringing about of political and social changes desired by the people' *Roth* v. *United States*, 354 U.S. 476, 484 [(1957)]" (376 U.S.,

at 269), which finds its most genuine expression in the vote.

The law of defamation is more accurately defined by what it seeks to protect rather than by what it is. "The law of defamation protects the interest in reputation—the interest in acquiring, retaining and enjoying a reputation as good as one's character and conduct warrant . . . . The test is whether the alleged defamatory matter has a tendency to harm the reputation or to deter such people from association with the person complaining that he has been defamed." 1 Harper & James, Torts § 5.1, pp. 349-350 (1956). A political campaign is frequently more a contest between reputations and personalities than a dialogue on issues. A successful effort is marked with the same results ascribed to a defamation—"to deter such people [the electorate] from association with [voting for] the person complaining that he has been defamed". One commentator astutely described this peculiarly American competition as follows (Noel, *Defamation of Public Officers and Candidates*, 49 *Colum. L. Rev.* 875 (1949)):

> Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent. If actionable defamation is possible in this field, one might suppose that the chief energies of the courts, for some time after every political campaign, would be absorbed by libel and slander suits. Moreover, the definition of a defamatory communication as one which "holds a person up to hatred, contempt, or ridicule" would not remove the impression that a flood of litigation would be in order.

Accusations that a candidate is or was, even long ago, a deviant, a drunkard, a racketeer, or a bootlegger

are categorically relevant to fitness for office. This Court has extended protection not only to gentle speech, soft epithets and constructive criticism. It rested its view on "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials". *New York Times Co.* v. *Sullivan, supra* at 270; *Garrison* v. *Louisiana, supra* at 75; *Rosenblatt* v. *Baer, supra* at 85. "For free speech concerning public affairs is more than self-expression; it is the essence of self-government". *Garrison* v. *Louisiana, supra* at 74-75.

The public interest is illustrated vividly in this case where the bootlegger statement was widely discussed at the polls on primary day (A. 196-197, 229) and in a prior campaign involving the respondent (A. 314). The interest of the voters in this primary was not atypical, but rather represented a healthy and insatiable zest for information about their potential leaders. As the Second Circuit observed in a libel action brought by a noted politician (*Goldwater* v. *Ginzburg, supra* at 335):

> By seeking election to the office of President of the United States, Senator Goldwater invited the press and the public to scrutinize every aspect of his life, public and private alike. His mental and physical health were proper targets for investigation and for adverse comment. We live in an age of powerful nuclear, chemical and biological weapons capable of massive destruction. These weapons are under the ultimate control of the President, and knowledge of the mental stability of the men who seek to be President is not only relevant but indeed crucial if the electorate is to choose intelligently the man to occupy our most powerful office.

To expose antagonists in an election campaign to a libel judgment for statements which a judge or jury later find unrelated to fitness would gravely dilute the right of free speech. In adhering to the actual malice formulation in variant situations, this Court has consistently stressed that the primacy of free speech requires a defense on the periphery to secure the core. Hence, the *Times* opinion recognized that (376 U.S., at 271-272) "erroneous statement is inevitable in free debate and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive', *NAACP* v. *Button*, 371 U.S. 415, 433 [(1963)]". *See Garrison* v. *Louisiana, supra* at 73-75; *Time, Inc.* v. *Hill supra* at 388-389; *St. Amant* v. *Thompson, supra* at 731-732. The Court has implemented Madison's view [11] that "some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press". *New York Times Co.* v. *Sullivan, supra* at 271. For this reason the Court in *Times* concluded that the defense of truth alone is inadequate to prevent an inimical self-censorship by the press (376 U.S., at 279):

> Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." *Speiser* v. *Randall*, [357 U.S. 513, 526 (1958)]. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendment.

There can be no litmus test for those on the hustings to calculate in the midst of a campaign the relevancy

[11] 4 Elliot's Debates on the Federal Constitution 571 (1876).

of contemplated criticism. And, if the statement is "irrelevant", even total truth is no guarantee of immunity under a non-constitutional rule, for a libel in the private sector may have to be made with "justification" or "good motives" or some other state law test. Such intolerable uncertainty would assuredly produce the very self-censorship which this Court eliminated in *New York Times* with respect to public officials.[12]

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[12] This was a major consideration for the Court concluding in *Farmers Educ. & Coop. Union* v. *WDAY*, 360 U.S. 525, 531 (1959) that Section 315 of the Communications Act of 1934 (48 Stat. 1088, as amended, 47 U.S.C. § 315(a)) proscribes defamation suits against a radio station broadcasting a candidate's campaign oratory:

> The decision a broadcasting station would have to make in censoring libelous discussion by a candidate is far from easy. Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question, involving as it does, consideration of various legal defenses such as "truth" and the privileges of fair comment. Such issues have always troubled courts. Yet, under petitioner's view of the statute they would have to be resolved by an individual licensee during the stress of a political campaign, often, necessarily, without adequate consideration or basis for decision. Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution. Moreover, if any censorship were permissible, a station so inclined could intentionally inhibit a candidate's legitimate presentation under the guise of lawful censorship of libelous matter. Because of the time limitation inherent in a political campaign, erroneous decisions by a station could not be corrected by the courts promptly enough to permit the candidate to bring improperly excluded matter before the public. It follows from all this that allowing censorship, even of the attenuated type advocated here, would almost inevitably force a candidate to avoid controversial issues during political debates over radio and television and hence restrict the coverage of consideration relevant to intelligent political decision.

It would cause those who would otherwise speak out to "steer far wider of the unlawful zone" (*New York Times Co.* v. *Sullivan, supra* at 279; *Time Inc.* v. *Hill, supra* at 389) at a time when uninhibited speech is most critically needed. *See Mills* v. *Alabama*, 384 U.S. 214 (1966). Madison's apt description of free speech as the "only effectual guardian of every other right (4 Elliot's Debates, *supra* at 553-554) is dramatically demonstrated in this case where the fundamental of informed self-government is threatened by the vicissitudes of a relevancy standard that curbs free speech.

The possibility that a jury will protect critical and caustic speech is no substitute for the absolute protection of the Constitution and has, moreover, been disproven by history. The use of juries in sedition trials under the Fox Libel Act of 1792 in England, the Sedition Act of 1789 and the Espionage Act of 1917 in this country did not reduce the conviction rate. Levy, Legacy of Suppression 131-132 (1961); Chafee, Free Speech in the United States 70-71 (Rev. ed. 1954). As one student of free speech pointedly noted (Levy, *supra* at 254): "English sedition trials, like the American ones a few years later, proved conclusively that making juries judges of the criminality of allegedly seditious words did not have the effect of broadening the scope of free discussion, certainly not during times of stress—and there are rarely sedition trials at any other times."

To subject the availability of First Amendment guarantees to a perilous fact-finding process would deny the great accomplishment of the Constitution. As Justice Jackson declared in a case sensitive to national allegiances at a time when this country was

engaged in a war of survival (*West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943)):

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote, they depend upon the outcome of no election.

The question whether criticism of a candidate's character is a matter of public interest cannot be obscured or made unreviewable by labeling it a question of fact for the jury. This Court, particularly in First Amendment cases as well as other areas of constitutional law, has stated that it would finally decide the issues upon which constitutional freedoms hinge.

Thus, in the *Times* case, the court defined its function as follows (376 U.S., at 285):

> This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." *Speiser* v. *Randall*, 357 U.S. 513, 525. In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth

> Amendment, protect." *Pennekamp* v. *Florida*, 328 U.S. 331, 335; see also *One, Inc.* v. *Olesen*, 355 U.S. 372. We must "make an independent examination of the whole record," *Edwards* v. *South Carolina*, 372 U.S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

See Garrison v. *Louisiana, supra; St. Amant* v. *Thompson, supra.* This court has similarly addressed itself to the meanings of obscenity (*Jacobellis* v. *Ohio*, 378 U.S. 184, 187-188 (1964)) and "clear and present danger" (*Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946); *see Feiner* v. *New York*, 340 U.S. 315 (1951)), because these concepts necessarily implicate an issue of constitutional law.[13] In rejecting state definitions of "public officials" for purposes of the *Times* principles, the Court in *Rosenblatt* ruled (383 U.S., at 84):

> Our decision in *New York Times* . . . draws its force from the constitutional protections afforded free expression. The standards that set the scope of its principles cannot therefore be such that 'the constitutional limits of free expression in the Nation would vary with state lines'. (Citations omitted.)

The rule which we propose—that defamation of a candidate for public office is always a matter of public interest and protected by the malice standard of the *Times* case—avoids the necessity for this Court or any other, to delve into the record to speculate whether

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[13] A wide range of other constitutional issues have been scrutinized under the same approach by this Court. *E.g., Haynes* v. *Washington*, 373 U.S. 503, 515 (1963) (voluntariness of confession); *Napue* v. *Illinois*, 360 U.S. 264, 272 (1959) (conviction secured with false evidence); *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 659 (1945) (state import tax); *Norris* v. *Alabama*, 294 U.S. 587, 589-590 (1935) (racial exclusion in selection of grand jury).

particular criticism is germane to a candidate's fitness. Indefinable problems of remoteness and citizen reaction are put aside. The continued vitality of democratic government demands that the electorate, not one or a handful of individuals, judge whether a defamatory statement reflects upon a candidate's qualifications for office.[14]

While equating the respondent to a public official, the trial court nevertheless instructed the jury that (A. 370) "[i]f [the disputed statement] would not touch upon or be relevant to his fitness for the office for which he was a candidate but was rather a bringing forward of the plaintiff's long forgotten misconduct in which the public had no interest", then the case would be adjudged by criteria akin to the common law fair comment rule.[15]

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[14] There is no impediment to our position from this Court's remark in *Rosenblatt* (383 U.S., at 88) that "as is the case with questions of privilege generally, it is for the trial judge in the first instance [and presumably thereafter the jury] to determine whether the proofs show respondent to be a 'public official' ". First of all, this follows common law tradition, which the Court specifically cited, 383 U.S., at 88, n.15. *See* 1 Harper and James, Torts § 5.29 (1956); Prosser, Torts §110 p. 823 (3d ed. 1964); Restatement, Torts § 619 (1932). In contrast, the common law rule applicable here vests the trial judge with exclusive authority to determine whether a defamation is a matter of public concern and consequently privileged. Restatement, Torts § 618(1); Prosser, Torts, § 110, p. 823 (3d ed. 1964). More important, the rubric of "public official" has been chosen as a constitutional principle, and is capable of acquiring precision to guide a jury. A concept of relevancy, on the other hand, has never been validated to delimit free speech, and for the reasons we have stated, it has no place where defamatory statements about a candidate's fitness for office are concerned.

[15] *See generally*, Restatement, Torts §§ 606, 607 (1932); Noel, *Defamation of Public Officers and Candidates*, 49 *Colum. L. Rev.* 875 (1949).

The New Hampshire Supreme Court's affirmance and apparently the trial court's disputed instruction, are bottomed on the following comments in *Garrison* (379 U.S., at 72):

> We need not be concerned whether this limitation [16] serves a legitimate state interest to the extent that it reflects abhorrence that "a man's forgotten misconduct, or the misconduct of a relation, *in which the public had no interest,* should be wantonly raked up, and published to the world, on the ground of its being true." 69 Hansard, Parliamentary Debates 1230 (3rd series) (H. L. June 1, 1843) (Report of Lord Campbell) (emphasis supplied by the Court).[8]

[8] We recognize that different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned; therefore, nothing we say today is to be taken as intimating any views as to the impact of the constitutional guarantees in the discrete area of purely private libels. (Footnote of the Court.)

In *Garrison,* the defendant was prosecuted under a state criminal libel for accusing state judges of indolence, of taking excessive vacations, and of being under the influence of racketeers. The above-quoted portion of this Court's opinion was in response to an argument that, in order to protect reputation, truth alone should not be an absolute defense, but only truth spoken "with good motives and for justifiable ends". The argument was of no avail, for this Court held (379 U.S., at 72-73) "where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth". The Court moved on to hold, consistent with

[16] The limitation adverted to, and which was invalidated, was a requirement under Louisiana law that the truth be spoken with "good motives and justifiable ends".

New York Times, that even false statements made in this context are protected absent actual malice.

An examination of the entire *Garrison* opinion confirms that the portion relied upon by the New Hampshire courts below has no adverse impact upon the position we advance here. In *Garrison* the state court erroneously ruled, as the jury did here, that the criticism was a "private libel", since it attacked the personal integrity of the judges. Reversing in language ignored by the New Hampshire courts here, this Court stated (379 U.S. at 77):

> Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, *anything which might touch on an official's fitness for office is relevant.* Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character. As the Kansas Supreme Court said in *Coleman* v. *MacLennan,* speaking of candidates:
>
> "Manifestly a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office, and the liberal rule requires no more. But in measuring the extent of a candidate's profert of character it should always be remembered that the people have good authority for believing that grapes do not grow on thorns nor figs on thistles." 78 Kan. 711, 739, 98 P. 281, 291 (1908). (Emphasis supplied.)

This proposition supports rather than precludes the position developed here; the prior references in *Garrison* to private libel merely deferred the isolated question of whether the Constitution requires truth to be an absolute defense *even* in the "discrete" area of libels "totally unrelated to public affairs".

III. Prior Illicit Conduct of a Candidate Is Relevant to His Fitness for Public Office

Assuming *arguendo,* that certain defamations may conceivably be unrelated to a candidate's fitness for office, we contend nonetheless that the alleged defamation here was germane to Roy's fitness for a seat in the United States Senate.

A relevancy test would, as we have already argued, be a wholly inadequate safeguard for the First Amendment. But, even if relevancy were the test, this Court would be obliged to examine the evidence to ensure that freedom of speech was not improperly abrogated. *New York Times* v. *Sullivan, supra* at 284-285; *Jacobellis* v. *Ohio, supra* at 187-188.

The Court, we submit, would necessarily conclude from such an examination that prior crimes of a candidate committed while he was an adult, even if 26 to 37 years ago (A. 415), bear upon his present fitness for election to high office. The illicit trade in liquor, which has been characterized as a crime of moral turpitude (*Costello* v. *United States,* 365 U.S. 265, 269-271 (1961)), has been and is popularly associated with organized crime. *See* Allen, Only Yesterday 204-224 (1931). The fact that the illegality occurred during the bygone era of Prohibition does not foreclose the possibility that a segment of the public would infer that the candidate retains unsavory associations or lacks moral fibre. It is, in brief, a matter that should

be aired, for the public's abiding concern with the background of those vying for leadership deserves answers.

The Supreme Court of New Hampshire intimated that such prior conduct would be relevant but for its remoteness here. (A. 415.) That, to be sure, is an elusive basis upon which to refuse the electorate the information necessary "to cope with the exigencies of their period". *Time, Inc.* v. *Hill, supra* at 388. The electoral process would be radically eviscerated if publishers were silenced for fear their comments will later be adjudged "too remote". And, if 26 years is remote, what about 15 years or 5 years? Such a theory, if sustained, would spawn a hodgepodge of unworkable censorship varying from jury to jury, state to state.

A man who thrusts himself into the political area can make no legitimate bid that the secrets of his life should be shielded from the public. If he is a former criminal, the Constitution permits and indeed expects his opponent fearlessly to proclaim the fact, even though actuated by ill-will or hate. State laws which attempt to create an enclave of private reputation for a public candidate or public official contravene the Constitution at least to the extent such laws suppress statements about the candidate's prior criminal conduct.

IV. There Is No Evidence That Either Respondent Published With Actual Malice

Should this Court uphold petitioner's position, no retrial of the case would be necessary, for the record demonstrates that neither petitioner acted with actual malice, i.e., with knowledge of falsity or reckless disregard of the truth.

Where the malice standard is invoked, the plaintiff has the burden of showing with "convincing clarity" (*New York Times Co.* v. *Sullivan*, 376 U.S., at 285-286) that a false publication was made with actual knowledge of its falsity or with a "high degree of awareness of . . . probable falsity." (*Garrison* v. *Louisiana*, 379 U.S., at 74.) In the lineage of decisions by this Court originating with the *Times* case, and especially in the recent holding in *St. Amant* v. *Thompson, supra*, a variety of reportorial practices have been screened for indicia of the presence or absence of malice. It can readily be seen that under these criteria, this record is devoid of any evidence that "could constitutionally support a judgment for respondent" (*New York Times Co.* v. *Sullivan*, 376 U.S., at 284-285).

The trial court found, as to petitioner NANA, that there was no malice.[17] NANA's posture is precisely that of the individual subscribers to the advertisement in *Times*, who were summarily vindicated as follows (376 U.S., at 286):

> The case of the individual petitioner requires little discussion. Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support.

As for petitioner Monitor, there was no suggestion that it knew the statement was false. Nor was there any evidence of a reckless disregard of the truth. Monitor published in reliance not only upon Pearson,

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[17] See note 3, *supra*.

(A. 296-297) whom the paper regarded from experience as reliable (A. 16, 31), but also upon its own reviewing editor, who, because of his personal knowledge of the bootlegger accounts associated with Roy, considered it unnecessary to verify the column (A. 295-306). Such verification attempts would, in any event, not be essential to dispel malice. *New York Times* v. *Sullivan, supra; St. Amant* v. *Thompson, supra.* Moreover, at the trial credible evidence was elicited showing the truthfulness of Roy's bootlegging. See Statement of the Case, *supra.*

These facts hardly measure up to the rigorous standards set by this Court to establish a reckless disregard. In *Times,* the paper's failure to review its own files which would have disclosed errors in the publication was held insufficient to evince a reckless disregard (376 U.S., at 287-288). In *St. Amant,* the lower courts found that the publisher had no personal knowledge of the defamed individual's activities but relied solely on an affidavit from a third party whose veracity was unknown, without attempting to verify the information with individuals who may have known the facts, and that the publisher made the statement heedless of its defamatory consequences. Holding that even the totality of these circumstances did not amount to a reckless disregard, this Court supplied the following explication of the controlling standard (390 U.S., at 730-731):

> These considerations fall short of proving St. Amant's reckless disregard for the accuracy of his statements about Thompson. "Reckless disregard", it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for

judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times, supra,* the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison* v. *Louisiana,* 379 U.S. 64 (1964), also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the necessity for a showing that a false publication was made with a "high degree of awareness of . . . probable falsity". 379 U.S., at 74. Mr. Justice Harlan's opinion in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 153 (1967), stated that evidence of either deliberate falsification or reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

The constitutional policy which impelled this stringent precondition to recovery was restated (390 U.S., at 731-732):

> It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concededly the reckless

> disregard standard may permit recovery in fewer situations that would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. We adhere to this view and to the line which our cases have drawn between false communications which are protected and those which are not.

Finally, the opinion notes instances where a reckless disregard may be probable (390 U.S., at 732):

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of a fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Juxtaposed to the facts here, *St. Amant* effectively scuttles any claim that Monitor acted with reckless disregard.[18]

Predictably, respondent will attempt to resuscitate his case with the assertion that Pearson published with actual malice and that this malice should be "imputed" to the respondents.[19] In the first place, such a rule would impose upon a newspaper the crippling task of verifying the accuracy of its myriad news sources. Thus, every wire story, every syndicated column, every letter to the editor published without verification would, under respondent's view, expose the newspaper to a libel judgment if its source harbored malice. The publisher of the small daily involved here pointed out the practical problems (A. 15):

> Q. Did you have at your newspaper, Mr. Langley, any facilities to check whether what Mr. Pearson was saying in those regards was true or false?
>
> A. We have no means. We have to buy columns, the Associated Press news, and so on, and we have to take them on faith. We do not have the facilities or the means or the time to go back and recheck everything which is delivered to us, even by our own town correspondents.

The inescapable consequence of an "imputed malice" theory would be a ubiquitous self-censorship.

Another, and insuperable obstacle, to imputation of malice here is that Pearson himself is not shown to

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[18] As previously mentioned, the jury did not reach the malice issue because of its obvious finding that this case was a private libel. In any event, the trial court's definition of reckless disregard (A. 377) was plainly improper. *See Henry* v. *Collins, supra; Beckley Newspapers* v. *Hanks, supra.*

[19] See Respondent's Brief in Opposition to Petition for Certiorari, pp. 21-32.

have been reckless. He obtained the bootlegger information from Scott, who had been immersed in New Hampshire politics for many years (A. 83, 88-89, 125, 154, 162), and corroborated it through Millimet (A. 162-163). The Fifth Circuit, recognizing the realities of the press, captures the spirit of the *Times* doctrine in an analogous setting (*New York Times Co.* v. *Conner*, 365 F.2d 567, 576 (5th Cir. 1966)):

> While verification of the facts remains an important reporting standard, a reporter, without a "high degree of awareness of their probable falsity", may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution by a public official.

The fact that Pearson did not confront Roy with the information on his bootlegging activities is of no moment, for as Pearson testified (A. 171):

> From long experiences I've found that when you talk to a man, he usually, if he's in an embarrassing position, he usually denies it.

Nor can malice be constructed upon an assumption of a reputation for inaccuracy on the part of Pearson, for the record shows Monitor knew Pearson's journalistic reputation to be good. Moreover, the District of Columbia Circuit, affirming the summary dismissal of another libel suit against Pearson, spurned a malice claim premised upon evidence of prior mistakes by Pearson (*Washington Post Co.* v. *Keogh*, 365 F.2d, 965, 971-972 (D.C. Cir. 1966), cert. denied 385 U.S. 1011 (1967)):

> [G]iven its broadest possible significance, Keogh's affidavit shows only that Pearson had made

erroneous statements on a very few prior occasions, and that he has a controversial reputation.

The significance of this evidence must be judged in light of the relevant standard of law. As the Court indicated in *Times,* evidence offered in a libel case might be sufficient to raise a jury question as to a publisher's negligence but insufficient to raise one as to his actual malice. Proof of isolated instances of inaccuracy, therefore, in a 35-year career during which Pearson has published well over 10,000 columns, cannot be accorded significance, since the relevant rule of law contemplates that "erroneous statement is inevitable in free debate, and * * * it must be protected if the freedoms of expression are to have the breathing space they need to survive."

Finally, it should also be emphasized that the gravity of a defamation is not an index of malice. *Washington Post Co.* v. *Keogh, supra* at 969-970. The only relevance that factor has to this case is that it furnishes all the more reason for ensuring that the electorate is not deprived of this information.[20] *See* Part II of the Argument, *supra.* In sum, Pearson, who considered Scott "very convincing on this point" (A. 162), had no reason to question the report.

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[20] It would also be chimerical to assume recklessness from the fact that Pearson acquired the information from Roy's opposition, for in a political campaign, derogatory information about a candidate does not come from his own faction.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of New Hampshire should be reversed and remanded to enter judgment for the petitioners.

Respectfully submitted,

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In the
Supreme Court of the United States

OCTOBER TERM, 1969

No. 8[redacted] 62

MONITOR PATRIOT CO.
NORTH AMERICAN NEWSPAPER ALLIANCE, INC.,
PETITIONERS,

v.

ROSELLE A. ROY,
EXECUTRIX OF THE WILL OF ALPHONSE ROY,
RESPONDENT.

BRIEF FOR RESPONDENT

BOIS & LAFLAMME and
MCLANE, CARLETON, GRAF,
GREENE & BROWN by
STANLEY M. BROWN,
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Manchester, New Hampshire

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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 891

MONITOR PATRIOT CO.
NORTH AMERICAN NEWSPAPER ALLIANCE, INC.,
PETITIONERS,

v.

ROSELLE A. ROY,
EXECUTRIX OF THE WILL OF ALPHONSE ROY,
RESPONDENT.

BRIEF FOR RESPONDENT

Opinions Below

The opinion below on which the Petition is based is *Roselle A. Roy, Executrix of the Will of Alphonse Roy v. Monitor Patriot Co., North American Newspaper Alliance, Inc.*, 109 N.H. 441, 254 A2d 832 (1969) and is Appendix A to the Petition. A prior opinion in the same case on another point is reported as *Roy v. North American Newspaper Alliance* in 106 N.H. 92, 205 A2d 844 (1964).

Jurisdiction

Petition for certiorari, filed by petitioners, was granted February 24, 1970. The Court's jurisdiction, which is limited by the Seventh, Ninth, and Tenth Amendments to the Constitution of the United States, is under 28 U.S.C. 1257 (2).

Constitutional Provisions Involved

Since this is a review on certiorari of a State Court decision affirming a constitutionally guaranteed jury trial providing a constitutionally guaranteed remedy for injury to the character of a citizen of the sovereign State of New Hampshire, the following Constitutional provisions of the State and Federal Constitutions are involved:

Constitution of New Hampshire, Part 1 (Bill of Rights, effective June 2, 1784):

Article 7: "The people of this state have the sole and exclusive right of governing themselves as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, pertaining thereto, which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled."

Article 12: "Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty and property . . . But no man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people.•••"

Article 14: "Every subject of this state is entitled to a certain remedy, by having recourse to the laws, *for all injuries he may receive in his* person, property, or *character*. . . ."

Article 20: ". . . In all suits between two or more persons . . . the parties have a right to a trial by jury and this method of procedure shall be held sacred, . . ."

Article 22: "The *liberty of the press* is essential to the security of freedom in a state: It ought, therefore, to be inviolately preserved."

Article 38: "A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to justice . . . and all the social virtues, are indispensably necessary to preserve the blessings of liberty and good government; the people . . . have a right to require of their law-givers and magistrates, an exact and constant observance of them. . . ."

Constitution of the United States (Bill of Rights, effective as of December 15, 1791):

Seventh Amendment: "In suits at common law, . . . the right to jury trial shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Ninth Amendment: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Questions Presented

I.

Whether this Court, in disregard of the plain prohibitions of the Seventh, Ninth and Tenth Amendments to the Constitution of the United States, may nullify a constitutional jury trial providing a constitutionally guaranteed remedy for defamation, by substituting its view of the facts already found by the jury below.

II.

Whether the Court below correctly applied *New York Times v. Sullivan*, 276 U.S. 254, in affirming the Trial Court's submit-

ting, on the evidence, as a question of fact to a jury, whether making an irrelevant false charge in 1960 that a candidate for U.S. Senate was "a former small time bootlegger" in the 1920's was a publication entitled to qualified privilege under *New York Times*, or whether it was purely private libel beyond the boundaries of factual reporting on the "official conduct" of the candidate and hence beyond the scope of the *New York Times* strictures.

III.

If reached, additional questions held to be moot below in view of the result reached there are: (1) whether the *New York Times* malice of a syndicated national columnist, who indemnifies his distributors and publishers against libel, is chargeable against them, and whether, on the evidnce adduced below of such malice and the reckless disregard of the distributor and publisher in this case, "respondent may be able to present a jury issue of malice as [defined in *New York Times*]" should the case be remanded. See *Rosenblatt v. Baer*, 383 U.S. 75, at 87. In the trial below the malice of the writer Pearson was held *not* chargeable to the petitioners, to which rulings exceptions were preserved but which were not ruled upon by the New Hampshire Supreme Court.

Statement of the Case

1. *Pearson, NANA, and Monitor*:

These actions of trespass and libel were instituted in 1960 against the Monitor Patriot Co. because of its publication of the September 10, 1960 Drew Pearson column in the *Concord Monitor*. In that column Pearson, reporting on a New Hampshire Ballot Law Commission proceeding to remove "straw" candidates, charged that Alphonse Roy

> "*a former small time bootlegger*",

was responsible for procuring the filing of three other "con-

victs" as Democratic candidates for U.S. Senate, and that he had done so to aid the Republican incumbent Senator Bridges.

Monitor, being a New Hampshire corporation, was unquestionably subject to the jurisdiction of the New Hampshire court. North American Newspaper Alliance (NANA), being a foreign corporation, contested jurisdiction, but was held subject to service in *Roy v. North American Newspaper Alliance, supra.* Pearson, who largely wrote the column and was the original publisher (to NANA) was not sued because, being a non-resident individual, he was not amenable to process in New Hampshire. The underlying arrangement between Pearson, NANA and newspapers such as Monitor, was as follows (See 106 N.H. at 95, 96, 97-98):

> "The Pearson column was received by the defendant [NANA] in its New York office where it was stenciled and mimeographed and shipped to subscribing newspapers on the East Coast. ***The defendant acted as agent for authors . . . and its duties were to sell the particular feature for the author and make an accounting to him. ***Under this contract Pearson agreed to indemnify the defendant against damages arising out of libel. . . . ***The defendant could reasonably anticipate that the sale, distribution and promotion of the Pearson column . . . might entail libel actions as its contract with Drew Pearson for indemnification attests."

Under this contractual arrangement (Exhibit 21), Pearson was free to write what he pleased, NANA was under no contractual obligation to investigate the facts, and while it might question Pearson, Pearson had the final authority for column content, and NANA could refuse to publish only in violation of its contract; it was protected by the indemnification agreement. (A 172-176)

Because of this situation, the Trial Court ordered counsel for Petitioners to advise whether Pearson was in fact controlling the case as the real party in interest defendant [so that, for example his "actual malice" would be chargeable to the named defendants below, the Petitioners here], but counsel successfully avoided compliance with this order by reporting inability to determine the fact (A. 8; T. 1-144 to 155).* As a result, the indemnification feature of the contract was excluded from jury consideration (T. 8-159, Exhibit 33; T. 8-92, 93). As a further result, the Trial Court held that neither NANA nor Monitor was chargeable with Pearson's reckless disregard for truth or falsity, although allowing both to claim reliance on Pearson as a responsible reporter.

The Petitioner Monitor, unlike NANA, was free to refuse to publish defamation, and was in a position to check the facts alleged by Pearson with regard to New Hampshire matters. Thus the two Petitioners were treated somewhat differently at the trial below.

2. *The jury trial and appeal:*

The cause was tried to a jury, *Morris, J.*, presiding, with verdicts against both Petitioners being returned after 14 trial days, on December 22, 1969. The cause was argued on appeal to the New Hampshire Supreme Court in February, 1969, with the decision complained of here resulting.

Statement of Facts

1. *Alphonse Roy's reputation:*

Alphonse Roy, 69 years old when this case was tried

*In seeking an extension of time in this Court counsel for Petitioners notified the Court (Mr. Justice Brennan):

"From the outset of this litigation, Mr. Pearson controlled the action as a result of an agreement by which he undertook to indemnify the petitioners against any judgment that might be entered in favor of the plaintiff, the late Alphonse Roy."

(T. 7-62), in September of 1960 had a good general reputation as a realtor and public servant who had held responsible public offices. Born in Canada, he was reared on Manchester's West Side with little formal education, but was self-educated while working as a textile mill worker (A-244 to 246). He was elected a Representative to the New Hampshire General Court in 1924, 1926 and 1928. He was elected as Alderman of Manchester, this State's largest city, in 1931; as a member of the Governor's Council (the second highest State elective office) in 1932 and re-elected to that office in 1934. He was elected Congressman in 1936 in the disputed Jenks-Roy election, and was his Party's unsuccessful candidate against Jenks in 1938 and 1940 (A 247-249).

In 1943 Roy ran unsuccessfully for the nomination for Sheriff of Hillsborough County, in 1944 he ran again and after having apparently won, lost in a recount. He was then, in 1945, named U.S. Marshal for the District of New Hampshire in which post he served two terms until 1953. He then ran unsuccessfully for Mayor of Manchester in 1954 and for Register of Deeds in 1956. In 1958 he was his Party's nominee for Congress, but lost to the Republican in the general election. (A 249-251).

Thus Roy, in 1960, had been a responsible public officer and Democrat politician for 36 years. He had never been charged with *any* criminal act in his entire life, either as an adult or as a minor. On September 10, 1960 Pearson's column referred to Roy as:

"a former small time bootlegger".

2. *Genesis of the September 10, 1960 column:*

Pearson threw this charge at Roy in a specially timed column published the Saturday before a Tuesday primary. *The bootlegger charge was wholly false and unrelated to the political story being written, which was also, insofar as it impugned Roy, wholly false.* This is what the evidence showed:

In 1960 Roy decided in the spring to become a candidate for the Democratic nomination for Congress to which he had been nominated in 1958, and actually filed for that office on July 18. He subsequently, on July 25 withdrew from that race and filed for U.S. Senate (A 252-253).

While intending to become a candidate for Congress, sometime before July 6, Roy called Ralph LaVallee to solicit his political support. At that time LaVallee was Superintendent of the Hillsborough County Farm and was also Democratic Town Chairman in Goffstown. During the telephone call LaVallee told Roy that another Democratic politician, Frank Sullivan, was confined at the Country Farm, and when Sullivan would be released. Who brought the subject up—Roy or LaVallee—was subject to conflicting memories (A. 253-256; 201-203).

A small group of Democrats, returning from the National Convention in 1960 decided to get the "best" ticket of New Hampshire candidates possible to assist their Presidential candidate John F. Kennedy (A. 50-52). They assumed the validity of a thesis that Democrats in New Hampshire must present a "balanced ticket" with a Franco-American, an Irish-American and a Yankee (whatever that is) as candidates for the three top spots of President, Governor and U.S. Senator. Bernard Boutin was their choice for Governor, so, with Kennedy the Presidential Candidate, they needed a "Yankee" candidate for the Senate. (A. 298; T. 4-61). Herbert Hill, an amiable Dartmouth College history professor, was the candidate selected.

On the last day for filing, July 28, three candidates in addition to Roy and Hill appeared; all were residents of Manchester (as was Roy), and two at least were Irish by name. All three had minor criminal records. See Exhibits 18, 19. They were Frank Sullivan, one Robinson, and one McCarthy. Frank Sullivan had previously been a candidate for office on several occasions, having once been nominated by the Democrats for Congress (T. 6-21 *et seq*); he filed because he disliked Hill

(A. 216) and thought he could win (A. 217; T. 6-35, 55). Robinson and McCarthy were political "unknowns."

Professor Hill's campaign manager was Joseph Millimet (A. 46, 68), but Joseph Scott claimed *he* was doing the work (A. 122, 152). The Hill campaigners reacted swiftly to the influx of "non-Yankee" candidates for Senate.

On July 30 Millimet filed a petition with the Ballot Law Commission seeking to disqualify Sullivan, Robinson and McCarthy as "straw candidates."

On July 31 the Democratic State Committee was harangued that *Roy* had procured the filing of the "straws", and the State Committee announced that Hill was the only qualified candidate and the rest (including Roy) were not qualified (A. 55, Exhibit 11).

Sometime shortly after July 28 (presumably before August 4) Scott *claimed at this trial* to have met Sullivan on Elm Street in Manchester and to have chided him for having filed; whereupon, according to Scott, Sullivan pulled out a roll of bills as big as a man's fist and said "Well, see what I got for it," explaining that Roy paid him to file as a straw (A. 120-122). [Scott had never told this canard before (A. 122, 123) and Sullivan emphatically denied the story (A. 212).]

Mr. Millimet tried the Ballot Law Commission proceeding August 3 and 4, without calling Scott, although attempting to prove that Sullivan and the other two were straws, and believing that Roy had arranged their filing (See Exhibit 12, A. 56-68).

The Ballot Law Commission ruled Robinson and McCarthy off the ballot as straw candidates, but left Sullivan on, so that the final slate of candidates consisted of Hill, Roy and Sullivan [and they finished in that order (A. 210), with Senator Bridges defeating Hill in the general election].

The Democratic State Committee's endorsement of Hill on July 31, Roy's reply in kind castigating the State Committee

and Hill, and the Ballot Law Commission's hearings and rulings received wide attention in the New Hampshire press, all *during the period July 30 to August 5* (See Exhibits 11, 13, D, E, F).

Some three weeks later Drew Pearson telephoned Manchester trying to locate someone in the Hill campaign to inform him whether a Fulton Lewis report that Kennedy was financing Hill with Fifty Thousand Dollars was true (A. 83-86). Scott called back August 24 (A. 147, 152-153), said Lewis was wrong, and told Pearson substantially all of the falsehoods concerning Roy of which complaint is made here, that is, in addition to the "bootlegger" report, he told Pearson that Roy had procured the straws including Sullivan, and was assisting Bridges in this effort. Scott said also that he told Pearson *he had no evidence* that these "straw" charges were well-founded (A. 90; T. 4-56 to 65).

Pearson and Scott made an agreement that Scott would supply Pearson with a copy of the Ballot Law Commission proceedings (T. 5-20, See A. 157, 158). Millimet had previously insisted upon introducing the "criminal" records of Sullivan, Robinson and McCarthy as part of that record (A. 80). And, although Mr. Millimet insisted that he never discussed with Scott what Scott was doing with Pearson (A. 78-80), Scott supplied Pearson with the Ballot Law Commission transcript and photocopies of *Millimet's* copies of the criminal records (A. 159 Compare Exhibits 18A and 19A with 18B and 19B). Thus Pearson was given *record verification* of the criminal records of everyone adversely commented on except Roy, and of the "straw" candidate controversy which resulted in Sullivan being found not to be a straw.

Pearson called Scott a second time August 25 or 26 (A. 156). He called Millimet between August 24 and August 27 (A. 160) and Millimet probably discussed "ticket balancing", Hill's chances, and the Ballot Law Commission proceedings (A. 161)

but said nothing about the "bootlegging", because he knew nothing of it. (A. 44, 45). If he discussed the "straw" and "Bridges" counts with Pearson *he warned Pearson that he had no facts to prove them* (A. 70).

Pearson knew and recognized that the sources for this anti-Roy defamation were Hill's political managers (A. 153, 171). His assistant talked to Senator Bridges but got no information (A. 148, 164).

Pearson also called Ralph LaVallee between August 24 and August 27, and injected Bridges' name into the call as indicated in the published column. (A. 156, 170). LaVallee and Roy were both emphatic, as was LaVallee to Pearson, that Bridges' name did not come up (A. 203, 204; 254-256). There was evidence that national columnists "throw in a big name to attract attention", and that Bridge's name would attract attention to the column whereas Roy's name would not (A. 304).

With *possibly* a further talk with one of his staff men, Fernsworth (A. 149-151, 163), this was Pearson's investigation of the "straw" and of the "Bridges" counts, and the story was complete August 27. He did not know Scott, Millimet, or LaVallee who were the informants. *He did not check Scott with anyone insofar as the "bootlegger" charge was concerned, and Scott was the sole source of this lie.*

Although the supposed facts were at hand not later than August 27, the story was not written up until September 7, and *was specially timed for publication September 10 "just before the election" of September 13* (A. 176-178). *Thus there was a period of 11 days available for checking the facts without impairing the "hot news" value of the libel.*

3. *The Bootlegger charge was intentional falsehood:*

Respondent has been prejudiced before this Court by Petitioners' having recited in their brief, as fact, evidence that was wholly disproven below. There is a difference between

evidence and proof, and with the findings of fact below presumed to support the verdicts, we state the facts presumably proven:

Scott was shown to be a liar, and the jury obviously did not believe him.

He was presented as a witness in the plaintiff's case, (A. 81-125) his deposition having been previously taken, for the purpose of having him tell the jury what he had told Pearson and what evidence he claimed to know to substantiate his "bootlegging" charge. *Every single item of such supposed evidence was then disproven through other witnesses.* (A. 138-139).

While Pearson said Scott related meeting Roy in a speakeasy (A. 162); Scott recanted on this before the jury (A. 97). Scott's *story* was that in 1928 or 1929 when he was in high school he and one Frankie Moran went to a speakeasy on Marion Street over a Chinese Laundry and bought a bottle and two drinks (See A. 96 to 119). "Shorty" Glaude and two others were there operating the speakeasy (A. 97). Scott claimed this was "Al Roy's" place—the respondent. The *proof was that Antonio Roy, no relation to respondent, was the only Roy connected with this speakeasy,* which in fact did exist on Marion Street over the Chinese laundry in the 1920's (A. 217-220).

Scott *said* that some time in the 1920's a man named Bourque lived on Alsace Street who was a part time bootlegger; he overheard Bourque tell his (Scott's) father that he got his supply from Al Roy—the respondent (See A. 105-109). Ulric Bourque was still alive; he did live on Alsace Street during the 1920's; he was a bootlegger; but *he did not buy his liquor from Roy and had no dealings with Roy with regard to liquor:* he got his supply in Lawrence, Massachusetts. (A. 138-140)

Scott buttressed these two lies with testimony that Roy confided to him privately at a much later time—on two occasions —that he had been a bootlegger (A. 92-96). Roy emphatically denied both conversations (A. 257). Additionally Scott was exposed as lying with regard to the first such supposed confidence, in that he was precise that on that occasion—the Manseau funeral—Roy was considering running for Mayor against Mayor Benoit whose popularity was thought to be waning (See A. 95). Benoit was Mayor for 10 years starting in 1945 (See A. 96). It was subsequently proven that the Manseau funeral was in 1943 (A. 123, 124). Scott was therefore obviously prevaricating on this one. The second supposed confidence was in 1948, while Roy was U.S. Marshal—hardly a likely tale.

Pearson's recollection of Scott's story to him (A. 162) sounded suspiciously as if Scott was romanticizing a 1923 episode in which respondent's brother, Manuel Roy was arrested, charged, and fined for possession of illegal liquor. On this occasion respondent Roy was taken to the station, but *not* charged with any offense, although the officers complained that he "interfered with an officer" (A. 126-128, 280-283). No one suggested at the time—1923—that Alphonse Roy was bootlegging.

The above is the *total* evidence on the charge that Alphonse Roy was a bootlegger, as a matter of fact. Roy denied it (A. 257), and the charge was proven false.

In New Hampshire there is a statute which permits evidence of "common report" to be admitted in defamation cases to mitigate damages (RSA 515:6 see A. 386-387) .Such "rumor" evidence was introduced and combatted.

All former liquor control and vice squad witnesses agreed that Respondent Roy was never on the suspect lists, there were no complaints about him, and his premises were never

searched. (Suosso, A. 125; Harbour, A. 204; Thirsk, A. 207; Moore, A. 309). Harbour heard rumors in 1932 that Roy had bootlegged (A. 206); Moore heard rumors that Roy was a bootlegger but recalled that *they had died out* long before Roy was elected to the Governor's Council in 1932. A former City Auditor recalled such gossip at City Hall while Roy was Alderman in 1931 (A. 307).

That no such rumors existed after 1932 is evidenced by the fact that active Democrat politicians such as Ryan (A. 196), Gauthier (A. 231); Early (A. 238), and even Millimet knew of no such rumors. Early was active from 1920 through 1962 and was State Chairman. Ryan was an opponent of Roy's from 1936 on. Millimet was active from 1948 to the date of trial and was a law partner of the State Chairman. The jury was entitled, on this evidence, to conclude that no "bootlegger" rumor was current for 30 years prior to the Pearson column.

It is in this context that the testimony of Enoch Shenton and Dion must be viewed. Dion claimed to have heard such rumors in 1956, when no one else heard them (A. 314). Shenton, attempting to justify his own conduct as Editor of the Monitor in not checking the "bootlegger" item, claimed to have heard, while Roy was a member of the Governor's Council that he had been and still was a bootlegger (A. 295-296). He then offhandedly added that the late Congressman Jenks told him *he* knew Roy was a bootlegger (A. 299). All of his sources were dead men. Since Dion and Shenton were demonstrated to be unworthy of belief on other testimony, the jury was entitled to, and presumably did disbelieve their testimony with regard to rumors after 1932. The most obvious refutation of this testimony is the fact that although Roy was in bitterly fought political campaigns in 1936, 1938 and 1944, no publication of such a charge was ever made until Pearson's column in 1960. (A. 300, 301).

4. *The Bootlegger Charge was private factual libel:*

In its opinion below, the New Hampshire Supreme Court correctly synopsized the evidence on the false bootlegger charge, and its view of the issue, as follows (See pp 16-17 of Petition):

> "The evidence fails to reveal that any prosecution for criminal activity of any kind was ever brought against Alphonse Roy. His only brush with the law was in January, 1923 when he was taken to the police station after a raid when he was present in a near beer parlor run by his brother. He was not charged with any violation and was released. This was 37 years before the publications here in question. Since prohibition ended in 1934, it is not probable that the bootlegger statement would be understood to refer to any activity within 26 years of the publication. Although there was evidence that there were rumors in the mid-twenties that plaintiff was a bootlegger, it was findable from the evidence that these had died out before he was elected to the Executive Council in 1932.
>
> "Although engaging in criminal activity even such as small-time bootlegging might be difficult to exclude from those things which affect fitness for office if it were alleged to have occurred recently its inclusion as a matter of law becomes less clear with the passage of a long period of time.
>
> "We are of the opinion that small-time bootlegging activity which occurred some 26 or 37 years in the past could be found to have lost its relevancy to prove the present fitness or unfitness of a candidate. The Trial Judge must have made this preliminary determination when he decided to submit the issue to the jury, *and the jury must have so found when they determined the defamation to have been a private one.*" (Italics added)

The evidence not only warranted the jury's conclusion, it virtually required it. Pearson was specific that "this was reported as a fact, yes" (A. 192), so was Monitor's publisher Jim Langley (A. 31). Pearson intended to make "a factual statement" (A. 193), as distinguished from an editorial comment. He had received this false information by telephone from Scott, whom he had never met and did not know, he made no check to verify the "bootlegging" report before publishing the accusation (A. 162, 171-172), *and didn't call Roy to confirm or deny because he expected Roy would deny it* (A. 171). Although Pearson had the false information about August 24-26, (A. 157), he deliberately delayed publication, and timed release just "before the election" (A. 176).

"Bootlegging" was intentionally used and was understood to mean illegal trafficking in liquor during the Prohibition era (A. 169, 28, 200, 226, 227, 228, 238). It was thus a charge of criminal activity. It in fact damaged Roy's reputation, being widely discussed and circulated (A. 31, 124-125, 196-197, 222, 230, 240-244). It also caused Alphonse Roy personal chagrin, shame and mental distress (See A. 260 to 262):

> "I was ashamed of myself. I hated to face people, having in mind that people knew that once upon a time I was a bootlegger . . . and I felt that this article . . . had succeeded to poison the minds of thousands of people, and I was really run down and I was hurt, and I felt that way for a long time." (A. 262).

Argument

I.

The Seventh, Ninth and Tenth Amendments to the Constitution of the United States do not Permit this Court to Nullify a Constitutional Jury Trial Providing a Constitutionally Guaranteed Remedy for Defamation by

Substituting Its View of the Facts Already Found by the Jury Below.

When we were previously before this Court in *Rosenblatt v. Baer*, 388 U.S. 75 (1966) we invited to the Court's attention that if *New York Times v. Sullivan*, 376 U.S. 254, were extended and interpreted as requiring trial *judges* to *rule as a matter of law* that every writing which contains reference to "matters of public concern" or which is published during a "public debate" is privileged, the result would be increased unjustified defamation with deterioration, rather than improvement, of the public debate on the conduct of public affairs. We also pointed out it has been recognized ever since the trial of *John Peter Zenger*, 17 Howells St. Tr. 675 (1735) that it is error for judges to determine that writings *are* libelous, and that by the same logic it would be error for judges to determine that they are *not*, where there are issues of fact raised as to the extrinsic facts upon which privilege is properly predicated.

Since then the extensions of the *Times* rule in the Courts below have virtually gone so far in some cases, and it is now argued seriously that it is error for the *judges* to substitute *their* views for the editorial judgment of the defaming writers or publishers (See Petition for certiorari in *Time, Inc. v. Wasserman*, October Term 1969, No. 1469, pp. 12, 14.

Under our Constitutional system there is no substitute for libel to deter irresponsible abuses of freedom of the press which take the form of false personal attacks, and the freedom was granted on these terms. It is incongruous, at least, in a period when charitable, governmental, and manufacturing immunities are being struck down to achieve more responsible conduct, that *Times* is being used to justify more irresponsible conduct by the press. It is illogical, at least, that this Court meticulously insists on observance of the constitutional safe-

guards provided to prevent persons from being unjustly accused, or convicted, of crime by public authority except upon some satisfactory proofs, while at the same time approving such accusations, and, yes, convictions, by the press on no proof at all—yet trial by newspaper is now argued as justification for *Times* application. See *Wasserman, supra,* at p. 23.

We believe it time to restore the intended constitutional balance and control, before we are confounded by our own Tower of Babel, and so, argue for proper reliance on the jury system.

The thrust of Petitioners' argument in this Court is that no jury can be permitted to find any facts in a libel case, if the plaintiff is a candidate for public office: that *anything* that a writer or publisher deigns to publish which defames a candidate "is always in the mainstream of public affairs" (Petitioner's Brief, p. 16). It is argued that "Accusations that a candidate is or was, even a long time ago, a deviant, a drunkard, a racketeer or a bootlegger are categorically relevant to fitness in office" even if wholly false (Id. pp. 18-19). It is further argued that *this* Court find no malice to have been shown—thus making all issues issues of constitutional law. If this Court accepts this argument, it can only do so in flagrant disregard of the limitations on its own powers delineated by the Constitution it interprets, and of the limitations on the powers of the United States specifically provided in both that Constitution and in the Constitutions of the several States, including the Constitution of the State of New Hampshire.

The Tenth Amendment (U.S.) acknowledges that powers not delegated to the United States by the (U.S.) Constitution nor prohibited by it to the States, are reserved to the States, or to the people. Article 7 of the New Hampshire Constitution's Bill of Rights reserves to the people all powers and rights of self-government not *expressly* delegated to the United States. Since the New Hampshire Constitution pre-dates the United

States Constitution, this reservation is valid.[1]

In the New Hampshire Constitution, adopted *before* ratification of the United States Constitution, the people *expressly* provided in Article 14 that every subject of the state is entitled to a certain remedy for injuries to "character", i.e. defamation, and further, by Article 20, that in such suits, the parties have a right to trial by jury. The same Constitution, in the same Bill of Rights, in Article 22, provides for liberty of the press. It is thus apparent that equal protection of law under the New Hampshire Constitution does not permit indulgence in the fallacy that freedom of speech or press is a constitutional right to be exercised at the expense of the rights of others to their reputation or character. Nor does Article 12 of the New Hampshire Constitution permit indulgence in the fiction that the reputation of *some* citizens must be sacrificed without compensation to permit the public press indiscriminately to broadcast defamatory falsehoods.[2]

The Ninth Amendment (U.S.) expressly requires that this Court neither deny nor disparage the right retained by the people of New Hampshire to have a remedy for injury to

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[1]"The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce; . . . . The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the state." *The Federalist* No. 45 (Madison) (Cooke ed. 1961). See also *The Federalist* No. 17 (Hamilton) (Cooke ed. 1961), *The Federalist*, No. 31 (Hamilton) (Cooke ed. 1961).

[2]The contemporary references to the fact that in the exercise of freedom of speech and press, some abuses must be expected, should be understood as intended at the time: *i.e.*, the fact that abuses would occur was not reason to impose prior restraint; the remedy of libel would make the press responsible, after the fact, for the abuse.

character. And the Seventh Amendment (U.S.) reads directly on Article 20 of the N.H. Constitution in requiring that the retained right to jury trial be preserved in both jurisdictions, and that facts found by juries as the triers of fact not be re-examined except in accordance with the rules of common law.

We additionally invite to the Court's attention Article 38 of the N. H. Constitution, which points out that the people have a right to require of magistrates an exact and constant observance of the fundamental principles of the Constitution, in this context: First Amendment (U.S.) or Article 22 (N. H.) protection of freedom of speech and press is *not* properly to be granted a superior position in the galaxy of reserved rights in derogation of or denial of the similarly reserved right of a jury trial remedy for injury to character.

Nor is the sovereign State of New Hampshire alone in thus recognizing and reserving to its people a remedy for defamation by jury trial. Massachusetts, Rhode Island, Maine, Connecticut, Delaware, Pennsylvania, and North Carolina, of the original 13 states have similar provisions, as do many other states which entered the Union later, such as Vermont, Alabama, and Arkansas. Delaware goes further and states that protection of character of its citizens is one of the fundamental duties of government.[3]

We therefore submit that this Court's comment that "libel" is merely an epithet of state law that can claim no talismanic immunity from constitutional limitations (*Times v. Sullivan*,

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[3]Massachusetts Const., Pt. 1, Art. XI; Rhode Island Const., Art. 1, §5; Maine Const., Art. 1 §19 see also §4; Connecticut Const., Art. 1, §10, see also §6; Delaware Const., preamble, Art. 1, §9, see also §5; Pennsylvania Const., Art. 1, §1 see also §7; North Carolina Const., Art. 1, §32; Vermont Const. Ch. 1, Art. 1; Alabama Const. Art. 1, §13; Arkansas Const., Art 2, §2.

376 U.S. 254 at 269) is error: the right to remedy for injury to character is a constitutional right of the citizens of New Hampshire (and of other states) which is entitled to recognition in this Court equally with the right of free speech and free press. These are competing *equally valid constitutional rights* which require accommodation, not one a step-child which can be abused by the favorite (See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 at 147).

This Court's rationale that the (U.S.) Fourteenth Amendment imposed the (U.S.) First Amendment ("*Congress* shall not . . .) requirement on the states, even if it be a valid construction, added nothing to the reserved rights already provided by the New Hampshire Constitution's Articles 14 and 22 insofar as freedom of the press is involved. No legislative act—no action by the State—is here involved (*Times, supra,* at 265, to the contrary notwithstanding); this litigation is between private citizens, with Roy exercising his constitutional right to seek redress for injury to his character, and with a jury of his peers awarding him just compensation.

It is also germane, in view of the argument made here that journalism must be allowed to be irresponsible, *i.e.* freed from responsibility for injury to the character of citizens whom it defames, to invite the Court to recall that "freedom of the press" as conceived by the founding fathers, had no such connotation at all. Repeatedly in the State Constitutions which were adopted contemporaneously with the Federal Constitution, the liberty or freedom of the press was preserved with the express provision that those who exercised this freedom did so subject to liability for its abuse.[4] Freedom of the press

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[4]New York Const., Art. 1§8; New Jersey Const., Art. 1, §6; Virginia Const., Art. 1, §12; Maryland Const., Art. 40; Georgia Const., Art. 1, §1, para XV.

meant and still means solely total freedom from prior restraint; it is error to indulge in the fiction that subsequent responsibility for abuse of the freedom is the equivalent of such prior restraint.[5] Nor is the argument valid factually since the press has ample insurance available to protect its business interest in spreading defamation, of which it takes advantage, as in this case.

The Constitutional issue arises, we submit, only when the remedies made available by the states permit a civil remedy to an individual for publication of an impersonal attack on government—*i.e.*, permit the subversion of the retained right of the individual into a State-sponsored attack upon the press for seditious libel on the government itself. *New York Times v. Sullivan*, 376 U.S. 254, might well be considered such a case, *Goldwater v. Ginzburg*, 414 F2d 324 at 342 (1969). Whether in any given case the publication is an attack on government, by criticizing a "public official" for his "official conduct", or whether it is an attack upon the individual *under color of* criticizing his conduct of public affairs, is the test, and that test is a test that depends upon facts.

In most of the cases that this Court has decided in the *Times* line (*Times* itself, *Garrison*, *Henry*, *Walker*, *Bresler*) the Court has *assumed* the good faith of the publisher, that is,

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[5]"The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now." *South Carolina v. U.S.*, 199 U.S. 437, 449, 50 L. Ed. 261. "It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights to the citizens, and so long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this Court, and make it a mere reflex of the popular opinion or passion of the day". *Scott v. Sandford*, 19 How. 393, 426, 15 L. Ed. 691.

that the publisher was exercising First Amendment rights rather than abusing them. In this case no such assumption is warranted.

In *Greenbelt Cooperative Publishing Association v. Bresler,* U.S. , 38 L. W. 4390, the newspaper articles complained of were contemporaneous, accurate, and truthful reports of what had been said at public hearings before a city council, embellished only by use of a subhead "blackmail". In contrast, here the excuse for the defamatory article was a hearing before a Ballot Law Commission, and the article was converted into defamation of Roy by reckless use of falsity, embellished by name dropping, and exaggerated into a national story. It was not published for the purpose of attempting to affect the result of the political contest (A. 194), but to sell Pearson's column, or, as Pearson claimed, to expose to the world that convicts were candidates for U.S. Senator in New Hampshire—and Roy was made a criminal for the purpose of selling the article.

There is no issue here that the "Bootlegger" charge was rhetoric, as in *Bresler,* or that anyone at the public hearing used such a charge or anything remotely akin to it: this was an intentional charging of a crime for no purpose related to the actual story being told, for no purpose related to Roy's candidacy—merely to categorize Roy as a convict to embellish the story. Three candidates with criminal records were not enough for Mr. Pearson, he created a criminal record for Roy to make the story better, and then adopted the insinuation that Roy was responsible for the filing of Sullivan (and so, of course, for the others)—the Fagin of the piece.

This is premeditation—intentional defamation—deliberately defaming an individual to make the story being told have more impact upon a reading audience other than the electorate before whom Roy was a candidate. This is *creating* an occasion to defame; making the facts fit the story, rather than attempt-

ing to tell it like it is.[6]

Roy, by his writ here, charged that the Pearson column was published maliciously, recklessly, and in bad faith for the purpose of defaming him, and that it in fact did defame him (A. 3, 4). The defendant Monitor, answering before *Times*, denied malice and intention to harm, and alleged a defense of (1) the truth, (2) a publication in good faith with a justifiable purpose on a lawful occasion, with reasonable belief in truth, (3) fair comment on common report, and (4) good faith republication with reasonable grounds of belief in truth (A. 6, 7). At pre-trial, after *Times*, the defenses asserted were (1) *Times* privilege and (2) truth. (A. 8). During the course of trial (after *Times*) both defendants joined in an amended answer, and asserted the defenses of (1) good faith publication on a lawful occasion without malice, (2) good faith publication on lawful occasion of the truth, (3) fair comment on common report, (4) republication with reasonable grounds of belief in truth, and added (5) they neither knew nor had any reason to know that the matters complained of were libelous and untrue. (A. 10-11).

On these pleadings the issues of fact were tried. Those issues included:

(1) Intentional defamation
(2) Falsity of defamation

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[6]This type of defamatory "jazzing up" of the story coupled with negligent failure to investigate was held sufficient to render an otherwise privileged writing actionable, both before *Times* and after, three times by the Seventh Circuit in *Pape v. Time, Inc.*, 318 F. 2d 652 (1963); 354 F 2d 558 (1965); third, 1969, decision unreported, see Appendix D to Petition for Certiorari in *Time, Inc. v. Pape*, October Term, 1969, No. 1309, and is the apparent reason for similar holdings in the "deliberate omission" cases, such as *Wasserman, supra* and its companion case *Ragano v. Time, Inc.*, 305 F. Supp. 1005, affirmed by the Fifth Circuit on June 2, 1970 as No. 28490 in that Court.

(3) Malice and recklessness
(4) Harm resulting from readers understanding the article in its intended defamatory sense.

On all of these issues, plaintiff Roy was charged with the burden of proof. While the "bootlegging" charge was ruled to be defamatory (A. 367), plaintiff was required to prove (and did) that it was intentionally used in its defamatory sense, and was so understood by readers (A. 368, 382). The *Times* defense was correctly charged, as it applies to "official conduct", nine times (A. 368, 369, 374, 375, 377, 378, 379, 380, 383), reemphasizing that plaintiff had the burden of proving falsity and malice if the libel were found to be in the public sector. In the private sector, the defense of truth as pleaded was charged (A. 376) as was good faith publication of falsehood on reasonable grounds of belief (A. 376-77), and fair comment (A. 379), and substantial truth was charged as a defense in *both* public and private sectors (A. 379). The shifting burden of proof on falsity was correctly charged (A. 381), but on the entire charge falsity was required to be found in order that plaintiff recover.

With these issues framed by pleadings, tried on evidence, and charged as issues to be found by the jury in reaching its verdicts, and with those verdicts having been returned in favor of Roy, on review according to the rules of the common law, all facts must be presumed to have been found which are necessary to sustain the verdicts, if there is evidence in the entire record to sustain the implied findings, and there is such evidence.

The basic findings of fact thus are:

(1) The "bootlegger" accusation was false, and was intentionally used in its defamatory sense and so understood.

(2) The publication of the "bootlegger" accusation did cause damage to Roy's reputation.

(3) The "bootlegger" accusation was a matter in which the public had no interest; it was not a matter which might touch on or be relevant to Roy's fitness for public office which should be brought to the attention of the public; it was rather a bringing forward of false forgotten rumors of misconduct (See A. 370, 373).

(4) The "bootlegger" accusation was not published in good faith without malice with good motives on a lawful occasion.

(5) The publication of the "bootlegger" charge was not based upon any reasonable belief in its truth, and was not fair comment.

(6) The "bootlegger" accusation was not substantially true.

With regard to this case, on this record, we submit that these facts must be taken as found by the jury, and this Court is not at liberty to substitute its view of these facts, or to adopt Petitioners' inconsistent view of these facts in disposing of the case.

II

The Court Below Correctly Applied New York Times v. Sullivan In Affirming The Trial Court's Submitting On The Evidence As A Question Of Fact To The Jury Whether Making An Irrelevant False Charge In 1960 That A Candidate For U.S. Senate Was "A Small Time Bootlegger" In The 1920's Was A Publication Entitled To Qualified Privilege Under New York Times or Whether It Was Purely Private Libel Beyond The Boundaries Of Factual Reporting On The "Official Conduct" Of The Candidate And Hence Beyond The Scope Of The New York Times Strictures.

The narrow issue sought to be reviewed here is succinctly explained and stated in the decision below (Petition, p. 15):

> "The main issue in the case as it comes to us, therefore, is whether the bootlegger part of the publication could be

found to be a purely private defamation and outside the constitutional protections of the New York Times rule which permits recovering only on proof that the publications were knowingly false or that they were false and were published with reckless disregard of the truth.

•••"We are of the opinion that small-time bootlegging activity which occurred some 26 or 37 years in the past could be found to have lost its relevancy to prove the present fitness or unfitness of a candidate. The Trial Judge must have made this preliminary determination when he decided to submit the issue to the jury, *and the jury must have so found when they determined the defamation to have been a private one.*" (Italics added.)

The specific point at issue here is whether, *in this instance* publishing an unverified, false, obviously defamatory charge of criminal conduct which was 26 to 37 years old, against a candidate for public office, was a publication in good faith for a justifiable purpose, or whether it was a publication under mere color of a lawful occasion, without good faith, where the protestation of acting for a justifiable end is made as a cover and pretense to publish and circulate defamatory material.

"Where, however, there is mere color of a lawful occasion, and the party, instead of acting in good faith, assumes to act for some justifiable end merely as a pretense to publish and circulate defamatory matter . . . he is liable in the same manner as if such pretense had not been resorted to." (*State v. Burnham*, 9 N. H. 34 at 41, 42, charged in this case at A. 384).

This is a question of fact, and was correctly left to the jury's determination.

The jury found that the bootlegging charge was not relevant to Roy's fitness for office, but rather a bringing forward of a

long forgotten false rumor in which the public had no interest. The evidence fully justifies that finding. The single fact that FBI checks on Roy in 1945 and 1949 in connection with his being appointed to the post of U.S. Marshall developed no reason to recommend against his appointment to that responsible law enforcement post, justifies the jury's conclusion, see T. 9-117 and T. 7-154 where Attorney Millimet says "*it wasn't a serious thing*, so they would have recommended"!! The witness William Moher, presented by the defense, acknowledged that such rumors as existed 43 to 44 years before were not current in the 1930's but had died out "long before that". Scott and Shenton, who testified to the contrary were demonstrated to be unworthy of belief, on this and on other items of testimony. The fact that Earley, Suosso, Thirsk, Gauthier, Ryan, Gay and Millimet knew of no such rumors over a period that covers 1926 to 1960 is indicative that no one considered over all these years that there was sufficient substance to the rumor to warrant using it openly. The fact that it was never reported in print, in spite of the 1936 Roy-Jenks battle and the 1944 Sheriff's race, is good evidence that there was no situation here that made this stale rumor relevant to Roy's qualifications for public office.

We would further invite to the Court's attention, that there was no relevancy to publishing the "bootlegger" charge in the September 10 column itself. The thrust of the article, as it related to Roy, consisted of repeating the already disproven charges that he arranged Sullivan's filing as a straw candidate, together with other straws, as a favor to Bridges in 1960. That story could have been told without throwing in the further gratuitous insult of the bootlegger charge. The bootlegger charge is foreign to the balance of the story, and constituted only a malicious defamation of one of the actors—Roy. (See T. 8-209 to 211). Journalistically, Pearson was discussing others

with criminal records, and, to put Roy in the same category, created a criminal record for Roy. See Pearson's explanation,

> "I deliberately put in the word 'later—'later U.S. Marshal'—because in the old days there were many people who were bootleggers. I know some very respectable big liquor dealers today, millionaires, who were bootleggers, but they've gotten over it, lived it down . . . Here Roy, apparently, if he became a United States Marshal, it was not held against him" . . .(A. 169).

This lame explanation by Pearson would justify the conclusion the jury reached on this issue. Even *he* assumed that the bootlegger charge was irrelevant to the 1960 campaign, but he used it, for no justifiable purpose, in reckless disregard for whether it was true or false, solely to defame Roy.

Petitioners do not dispute that the evidence justifies the jury finding; they argue that *Times v. Sullivan* precludes there being any factual issue. Essentially the Petitioners' position is that if a man stands as a candidate for U.S. Senate *anything* anyone writes about him is privileged. We do not so understand the law.

The *New York Times* rule has two requirements. It is only defamation (1) of a "public official" (whatever that may mean), (2) concerning his "official conduct" (whatever that may mean), that is protected. The type of publication toward which the constitutional protection is extended is "*criticism of official conduct*". The rule is:

> "A public official [cannot recover] damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' —that is, with knowledge that it was false or with reckless disregard of whether it was false or true." (376 U.S. at 279,280).

In footnote 23 (376 U.S. at 283) the Court goes to to say:

> "We have no occasion here to determine [1] how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule. . . . Nor need we here determine [2] the boundaries of the 'official conduct' concept."

Thus it is made clear that there are limits to both branches of the *New York Times* rule, and that *"there are boundaries" of the "official conduct" concept.*

Mr. Justice Goldberg's concurring opinion joined in by Mr. Justice Douglas refers to the intended boundary line, at p. 721 of 11 L. Ed.:

> "This is not to say that the Constitution protects defamatory statement directed against the private conduct of a public official or private citizen. ***Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment."

Our case of *Baer v. Rosenblatt,* 106 N.H. 26 (1964), was reviewed on certiorari for the express purpose of further defining the concept of "public official", *sub nominee Rosenblatt v. Baer,* 383 U.S. 75 (1966) (see footnote 12), without any consideration being given to the "public conduct" concept, because the libel was obviously related to Baer's supposed conduct in the employment he held. The case was remanded for trial because on the record already made, it was apparent that *the case might fall outside of the New York Times rule,* and that even if it were governed by the *New York Times* rule "respondent may be able to present *a jury issue* of malice as

there defined" (383 U.S. 87). The Court went on to "remark" that it was for the "trial judge" in the first instance to determine whether *the proofs show* respondent to be a 'public official' (italics added)."

Now, if proof of the existence of a "public official" status is factual, it seems equally clear that whether or not a false defamatory publication is within or outside of the "boundaries" of reports of "official conduct" is similarly an issue of fact to be decided on evidence.

Belli v. Orlando Daily Newspapers, Inc., 389 F. 2d 579 (1967) was disposed of by the Fifth Circuit precisely in this manner, and certiorari was denied by this Court on October 14, 1968 in No. 96, *Orlando Daily Newspapers, Inc. v. Belli.* In the *Belli* case the defendants published in a gossip column (Is Pearson's column anything else?), a 9 year old false story that Belli had "taken" the Florida Bar Association by charging hundreds of dollars worth of clothing to his hotel bill, which the Bar Association had agreed to pay in consideration of Belli's appearing on a panel at its meeting. Among the defenses asserted was the claim that Belli was a "public figure" (which was acknowledged by the Court) and that the item qualified under *Sullivan* and *Butts* as comment on his "official conduct." The Fifth Circuit reversed a lower court dismissal, and remanded the case for trial to jury. *Wisdom, J.*, speaking for the Court, said:

> "Not only must Belli be considered a public figure before the defendants can avail themselves of the *New York Times* privilege; *the matter covered by the publication must be of legitimate and substantial public interest. Thus a court* confronted with a defamation suit in which the defendant asserts the New York Times privilege *is compelled to make a dual inquiry* (1) whether the plaintiff is a public figure and (2) *whether the alleged de-*

> *famatory publication is directed toward his public conduct**** We conclude, therefore, that *the trial court is the proper arena for development of the relevant facts and resolution of the crucial issues in the first instance.*" (389 F. 2d 587, 588, italics added).

The Court went on, by footnote 15, to cite *Rosenblatt v. Baer's* "remark" as authority for this deposition.[7]

Insofar as this Court's "remark" in the *Baer* case that it is for the "trial judge" "in the first instance" to determine the issue is concerned, the "trial judge" in this case did so: he determined in the first instance that *findably* the "bootlegger" charge was not relevant to Roy's candidacy, and correctly left it to the jury to determine *on the facts* whether or not the charge did bear on Roy's fitness as a candidate.[8] This is the correct disposition of a disputed fact issue.

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[7]In addition to *Belli v. Orlando Daily Newspapers, Inc.* the following cases similarly appear to recognize a factual issue as to the extent of the "official conduct" concept of *New York Times v. Sullivan: St. Amant v. Thompson,* 390 U.S. 727; *Goldwater v. Ginzburg,* 261 F. Supp. 784 S.D., N.Y. 1966); *Tucker v. Kilgore,* 388 SW 2d 112 (Ky. 1964); *Eadie v. Pole,* 91 N.J., *Super* 504, 221 A2d 547 (1966); *Keogh v. New York Herald Tribune, Inc.,* 51 Misc. 2d 888, 274 NYS 2d 302 (1966); *Cabin v. Community Newspapers, Inc.,* 27 App Div 2d 543, 275 NYS 2d 396 (1966); *People v. Mager,* 25 App Div 2d 363, 269 NYS 2d 848 (1966).

[8]*Prosser* in *The Law of Torts* (relied on in *Butts*) concurs, at Section 95, pp 625, 623, that

". . . Qualified privilege does not extend . . . to the publication of *irrelevant defamatory matter* with no bearing upon the public or private interest which is entitled to protection" (p. 625)

"*It must rather be* directed and *confined to the facts which are matters of public concern, and not go beyond them, as by attacking the personal character. . . .*" (p. 623)

In this case the story which was a matter of public concern, though stale, was the straw candidate story—to which the bootlegger charge was irrelevant, not a matter of public concern, and a deliberate attack on personal character.

Plaintiff's position was made known at the outset below that there was no useful purpose in publishing in 1960 false gossip about a man in 1920 or 1930, and the relevance of Pearson's doing so to the issue of malice that destroys privilege was pointed out, (See T. 1-24), and maintained throughout trial (See T. 8-209 to 211, RC 18-21 to 26). The defense posture itself recognized that this was a dragging in of an irrelevant matter so old as to be without significance (T. 1-111, 112; see also T. 1-88; T. 7-84, 142), and Langley could think of no relevant purpose for this aspect of the publication. (A. 24).

This particular aspect of libel law—"the color of lawful occasion" subterfuge of character assassinators—has not yet been directly reviewed by this Court. In *St. Amant v. Thompson*, 390 U.S. 727, there is language which indicates that this Court recognizes that irresponsible publishers will take such advantage and attempt to claim *New York Times* protection, and that in such cases the jury need not believe their protestations. The following excerpt, we feel, applies generally to this case:

> "*The finder of fact must determine whether the publication was indeed made in good faith.* Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call." (390 U.S. at 732, italics added).

Here we see this Court recognizing that the *good faith* of the publisher of libel is a question of fact, and that his professions of good faith need not be believed. The corollary of this rule was recognized by the New Hampshire Court as early as *State v. Burnham*, 9 N.H. 34 and *Palmer v. Concord*, 48 N.H. 211: that the existence of a "lawful occasion" to publish depends upon the actual, factual *motives* of the publisher:

> "*A court cannot rule* that a communication is privileged without assuming the conditions on which it is held to be privileged, namely, that it was made in good faith, for a justifiable purpose. . . ." *Palmer v. Concord* at 217).

This rule has been uniformly followed in New Hampshire through *Lafferty v. Houlihan*, 81 N.H. 67 to *Baer v. Rosenblatt*, 106 N.H. 26. While *New York Times* carved out an area—"official conduct of public officials"—where it superimposes its First Amendment protection—in point of fact no case has yet been presented to this Court in which the existence of the lawful occasion on which the privilege is based was challenged. This case is therefore of first impression insofar as that aspect is concerned.

If we assume, *arguendo*, that Pearson's retelling the story of the straws and Bridges was germane to the 1960 campaign as a report (albeit a false one) of Roy's official conduct as a public candidate, and that the motives of the publishers were to "prevent the election of an unsuitable person to office" (*State v. Burnham* at 41), although Pearson denied this motive, that does not answer the further question whether bringing forward a stale false rumor of bootlegging was also germane. Roy's conduct *as a candidate* in 1960 may be admitted to be "official conduct" under *New York Times*. His supposed conduct as a private citizen in 1923 was as clearly not official conduct. Throwing the false 1923 "bootlegger" charge into the 1960 story was needless, heedless and not germane either to the 1960 campaign or to the story being told.[9] As Mr. Justice Fortas

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[9]The practical necessity of re-recognizing the "lawful occasion" rationale developed over the years by state decisions is interestingly demonstrated by our companion case of *Ocala Star-Banner Company v. Damron*, October Term, 1969, No. 1373, where a "wind-fall" privilege is claimed.

It is a basic journalism example that the publication that "Mary Smith gave birth to a child last night" is defenseless libel if the wrong Mary

said dissenting in *St. Amant v. Thompson*, 390 U.S. at 734, in another connection:

> "The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. ***The public official should be subject to severe scrutiny and to free open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy at law. *New York Times* does not preclude this minimal standard of civilized living."

Roy was, in this case, "needlessly, heedlessly, falsely accused of crime." Needlessly because the charge was not germane to the 1960 issues or to the story being told; heedlessly because neither petitioner concerned itself with the truth or falsity of the charge, and falsely on the evidence and finding of the jury.

The judgments should be affirmed.

Smith is identified, since the erroneous identification makes the story false, at least embarrassing, and if the wrong Mary Smith is single, extremely damaging. Similarly, a publication of a charge of crime becomes false where the wrong individual is indentified, and injury to reputation *does* result.

In *Damron* perhaps (although other arguments are possible) the publication was such an error. Properly viewed on that basis the "lawful occasion" would be the reporting of criminal court news, and the extraneous fact that Damron was also a public official would *not* create an "accidental" additional privilege. Nor should it, unless "public officials" are second-class citizens. The point is, simply, that publishers of defamation should *not* be entitled to claim a privilege which is not germane to their publication. The Fourth of July is a holiday, but it is not therefore a day upon which libels attacking patriotism are privileged because it is a lawful occasion. If, in the *Damron* case, the defense were timely pleaded that it was *intended* to defame Damron in his political contest, on these facts, would it not be an issue of fact whether that defense were honestly made? Or whether, after the fact, this intention is claimed to get "under color of" privilege? In the instant case, similarly, Pearson claimed he had no intention to affect the political contest in which Roy was a candidate; why therefore should his publishers get a "windfall" defense?

III.

If New York Times is Held to Apply in this Case, the Record Below Contains Evidence of New York Times Malice in the Sense of Reckless Disregard for Whether the "Bootlegger" Charge was True or False to Satisfy the Requirements of that Rule. In This Regard the Trial Court Erred in Not Charging the Malice of Pearson, the Writer, to Those Indemnified Distributors who Thereafter Published.

The New Hampshire Supreme Court sustained the verdicts as proper on the jury finding that the "bootlegger" publication was a private libel, and therefore refrained from reviewing, *as moot,* Roy's contention that the record includes sufficient proof of "actual malice" under the *New York Times* doctrine to sustain the verdicts even if the publication were found or held to have been in the public sector.

The record contains ample such evidence, and therefore, even if the judgments being reviewed were thought to be improperly based on the private sector rationale, they should not be summarily reversed, since they are sustainable alternatively because in the trial a sufficient showing of "actual malice" was made out, and on a new trial would be provable again. This aspect of the case is fully presented in Respondent's brief to the New Hampshire Supreme Court at pages 19-33 and in our Brief in Opposition to Petition for Certiorari in this Court, at pages 21-32.

We respectfully request that this Court review the record on malice and those arguments, as if the arguments were fully reprinted herein. We add to those arguments the following:

We distinguish *Butts* from *Walker* as this Court did on the basis that there was no "hot news" aspect to *Butts* (18 L. Ed. 2d at 1112) that excused responsible investigation of serious charges, as *was* the situation in *Walker.*

On the same line of demarcation, the *Roy* case is like *Butts*: the false "bootlegger" charge was made by Scott to Pearson on or before August 26 and the libel was published 15 days later on September 10. Although the "bootlegger" accusation was by telephone from a single source unknown to Pearson, unsupported by any other informant (like *Butts*) and the entire article's preparation was complete on August 27, *nothing was done, nothing was attempted, during the next 11 days before the libel was written to attempt to verify its accuracy.*[10] There was no "hot news involved—the public press in New Hampshire had previously reported fully on the *actual* facts that may have been germane to the political campaign then in progress. Its publication was timed just prior to the election only to increase its appeal to readers—not to affect the election.

In *Goldwater,* and in *Pape supra,* and in *Rosenbloom v. Metromedia,* 415 F 2d 892 (1969) (No. 947, October Term, 1969, in this Court), the Circuit Courts have recognized that while it is not realistic to require thorough research or verification of each individual item in a story where there is a "hot news" commercial necessity for speed, these considerations should not excuse reckless disregard when there is no such pressure. As the *Goldwater* opinion states:

> "The Goldwater Article did not contain 'hot news'; ***; the seriousness of the charges called for a thorough investigation but the evidence reveals only the careless utilization of slipshod and sketchy investigative techniques. . ." 414 F. 2d at 339.

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[10]A similar situation apparently exists in *Damron,* which involves an April 6 news item which was phoned in by an apparently responsible, known, source, but not published until April 18.

The same comment accurately applies to this case. If the petitioners or Pearson "had checked only casually he would have discovered" he was wrong. He published defamation deliberately "without interviewing or attempting to interview" Roy or any source other than Scott.

This conduct, unless this Court rules as a matter of law that Drew Pearson had infallible ESP abilities, is reckless disregard for whether what he wrote was true or false.

At least, in *St. Amant*, a written affidavit from the informer was relied upon. At least, the informant was known to the defamer and there was a basis for thinking him a responsible source. *This* "bootlegger" libel was based "wholly on an unverified . . . telephone call" (390 U.S. at 732), which this Court recognized in *St. Amant* would be profession of good faith that would be unlikely to prove persuasive to the finder of fact.

We therefore suggest that the jury here reached the right result, and a result which it probably would have reached under a *Times* charge, if Pearson's malice had been correctly charged to them. If the judgments are vacated, a new trial is therefore in order.

Conclusion

We submit that the decision of the New Hampshire Supreme Court correctly ruled that the jury's finding that the "bootlegger" libel was a private libel outside the "official conduct" concept of *New York Times v. Sullivan* was proper on the evidence in this case. For that reason, the judgements below should be confirmed. But if this Court expands, retrospectively, its "official conduct" concept to encompass such defamation, the Court should review *Respondent's* contentions that Pearson was shown to have written the libel with "actual malice" which was chargeable to these Petitioners, and which would sustain the judgments if the bootlegger charge is held to be subject to

the *New York Times v. Sullivan* requirements, and a re-trial should be ordered.

Respectfully Submitted,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 891

MONITOR PATRIOT CO., NORTH AMERICAN NEWSPAPER ALLIANCE, INC., *Petitioners,*

v.

ROSELLE A. ROY, Executrix of the Will of ALPHONSE ROY, *Respondent.*

On Writ of Certiorari to the Supreme Court of New Hampshire

REPLY BRIEF FOR PETITIONERS

The respondent devotes a considerable portion of his brief (Br. 6-14) to an attempt to discredit Scott, upon whom Pearson principally relied for the bootlegger statement, and to show that the bootlegger statement was false.[1] This approach, however, fails to confront the issues in this case.

[1] Respondent's assumption that the jury found the bootlegger statement to be false is unfounded, for the general verdict may just as probably have been grounded on a finding that the statement was not "relevant" to Roy's fitness for office or that it was published without a "justifiable motive." That the instructions to the jury permitted a verdict for the plaintiff on such a finding (A. 366-394) is the basic defect of the judgment.

First, respondent fails to show that Pearson had any reason to believe that he was receiving false information or that Scott was untrustworthy. At best, respondent presents evidence that the bootlegger statement may have been false,[2] but not a falsehood published with malice by Pearson.

Second, even assuming that Pearson was reckless in relying upon Scott for the bootlegger statement, the

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[2] Respondent's attempt to attribute to the petitioners knowledge of Scott's alleged prevarications requires disortions of the record:

To show that petitioners' trial counsel (and therefore, perhaps petitioners as well) had no faith in Scott's credibility, respondent points to an incident, testified to by Scott, concerning receipt of money from Roy for filing as a straw, and observes that counsel did not call Scott to testify to the fact at the Ballot Law Commission hearing. (Br. 9.) The record shows, however, that Scott had not informed counsel of the incident at the time of that hearing. (A. 121-122.)

As evidence of the recklessness of reliance on Scott, respondent asserts (Br. 10) that Scott "told Pearson he had no evidence" to support his story that Roy had arranged the straw candidacy. Respondent's record reference (A. 90) supports the proposition that Scott had no evidence, but neither there nor anywhere else does the record indicate that he ever told Pearson so.

Respondent even attempts to give the lie to Pearson about his reliance on Scott. Respondent says (Br. 12):

> While Pearson said Scott related meeting Roy in a speakeasy (A. 162), Scott recanted on this before the jury (A. 97).

In support of the alleged recantation respondent goes on to describe Scott's testimony about a speakeasy incident at which Roy was not present. (Br. 12.) Whether or not this amounts to a recantation of Scott's story of once having met Roy in a speakeasy (A. 162) depends on whether the same incident was being described, as to which the record is silent. But even if it was the same incident, so that Scott was recanting his story of having met Roy in a speakeasy, nothing in the record can support respondent's assertion that Scott recanted that he had told Pearson the story.

malice of Pearson does not create liability for the petitioners NANA and Monitor Patriot. (See petitioners' Brief p. 34.) Respondent has not shown that NANA and Monitor Patriot published with malice. The fact that there was an indemnity agreement between NANA and Pearson does not alter that requirement. Even absent such an agreement, basic principles of torts could give NANA a claim over against Pearson for libel judgment resulting from Pearson's column. *See* Prosser, Torts §§ 43-48, pp. 258-281 (3rd ed. 1964). The publisher's right to shift liability back to his source has not caused this Court to dispense with the constitutional requirement of malice.

Respondent's legal argument, for the most part,[3] requires no reply. It seems to attribute to petitioners the position that any candidate for public office may be libeled without any recourse. We do not so contend. Our position is that a statement that defames a candidate is necessarily relevant to his fitness for office, and hence, recovery is limited by *New York Times Co.*

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[3] Respondent's analogy (Br. 31-32) to *Belli* v. *Orlando Daily Newspapers, Inc.*, 389 F.2d 579 (5th Cir. 1967), *cert. denied* 393 U.S. 825 (1968), involving the discrete category of "public figures," is fallacious. Whether there are limitations upon the scope of constitutionally protected criticism directed against a "public figure" is a question not before this Court in this case. Distinctions can, however, readily be drawn. The involvement of a public figure, in contrast to one who holds or seeks public office, in matters of public concern is restricted and does not implicate democratic processes. Whether his prior activities or his character are germane to this limited public involvement may depend upon a factual analysis of the nature of that involvement. In contrast, a candidate for elective office commits himself fully to the public arena. Free discussion of his past conduct and of his character, qualified only by the malice rule, is, as we have pointed out, an essential ingredient of a democratic system.

v. *Sullivan,* 376 U.S. 254 (1964) and its progeny, to libels that are made with malice, as that term has been defined by this Court.

CONCLUSION

For the foregoing reasons and the reasons expressed in petitioners' main brief, the judgment of the Supreme Court of New Hampshire should be reversed and remanded to enter judgment for the petitioners.

Respectfully submitted,

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Dated: July, 1970

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MONITOR PATRIOT CO. ET AL. *v.* ROY

CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

No. 62. Argued December 17, 1970—Decided February 24, 1971

Just before the 1960 New Hampshire Democratic primary election, petitioner newspaper published a column characterizing senatorial candidate Roy as a "former small-time bootlegger." Roy, who was not elected, sued the newspaper and the distributor of the column for libel. The judge told the jury that Roy, as a candidate, was a "public official," and that a rule requiring a showing that the article was false and had been published "with knowledge of its falsity or with reckless disregard of whether it was false or true," applied as long as the libel concerned "official" as opposed to "private" conduct. The jury were instructed that if they found the libel to be in the "public sector," they had to bring in a verdict for the distributor, as there was no evidence that it had engaged in knowing or reckless falsehood, but that they had to decide on the "preponderance of the evidence" whether the newspaper was liable. If the publication was in the "private sector," there were two defenses: (1) "justification," if the article was true and published on a "lawful occasion," and (2) "conditional privilege," if the article was false but if the publication was "on a lawful occasion, in good faith, for a justifiable purpose, and with a belief founded on reasonable grounds of the truth of the matter published." The jury returned a verdict against both the newspaper and the distributor of the column. The State Supreme Court affirmed, holding that the jury properly considered whether the alleged libel was "relevant" to Roy's fitness for office. *Held:*

1. Publications concerning candidates for public office must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office. Pp. 5–7.

2. As a matter of constitutional law, a charge of criminal conduct, no matter how remote in time or place, can never be irrele-

Syllabus

vant to an official's or a candidate's fitness for purposes of applying the "knowing falsehood or reckless disregard" rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254. Pp. 7–11.

3. The jury here were erroneously permitted to determine that the criminal charge was not "relevant" and that the *New York Times* standard was inapplicable. P. 12.

109 N. H. 441, 254 A. 2d 832, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. WHITE, J., filed a concurring opinion, see No. 118, *Ocala Star-Banner* v. *Damron*. BLACK, J., filed an opinion concurring in the judgment and dissenting in part, in which DOUGLAS, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 62.—October Term, 1970

Monitor Patriot Co. et al., Petitioners, *v.* Roselle A. Roy, Etc. | On Writ of Certiorari to the Supreme Court of New Hampshire.

[February 24, 1971]

Mr. Justice Stewart delivered the opinion of the Court.

On September 10, 1960, three days before the New Hampshire Democratic Party's primary election of candidates for the United States Senate, the *Concord Monitor*, a daily newspaper in Concord, New Hampshire, published a syndicated "D. C. Merry-Go-Round" column discussing the forthcoming election. The column spoke of political maneuvering in the primary campaign, referred to the criminal records of several of the candidates, and characterized Alphonse Roy, one of the candidates, as a "former small-time bootlegger."[1] Roy was not

[1] The text of the portion of the column concerning the New Hampshire primary was as follows:

"Political Snafu

"Rock-ribbed Republican New Hampshire, whose ex-Gov. Sherman Adams was top kick in the White House for years and whose Sen. Styles Bridges is still top kick on the GOP side of the Senate, is so fouled up in a primary snafu that the state may go Democratic this year. The primary verdict is due next Tuesday.

"Even that able Senate stalwart, Styles Bridges, is restirring himself. He has nothing to worry about from his Republican opponent, but the Democrats have put up a dynamic Dartmouth professor, Herbert Hill, against him. The professor came within

elected in the primary, and he subsequently sued the Monitor Patriot Co. and the North American Newspaper Alliance (NANA), the distributor of the column, for libel.

11,000 votes of defeating Sherman Adams, lately of vicuna-coat fame, in the 1948 gubernatorial race.

"Curiously, the Democratic primary has been cluttered with a motley assortment of candidates who have challenged Hill for the privilege of running against Bridges. That sly, old Republican disclaims any connection with it, but he appears pleased over the muddying of Democratic waters.

"One of Hill's primary opponents Frank L. Sullivan, was released from the Grasmere County Work Farm just in time to file for the Senate. With a police record of no fewer than 19 convictions for drunkenness since 1945, he was serving his latest 90-day sentence.

"Curious Call

"To make sure he would get out in time to run for the Senate, a former small-time bootlegger and later U. S. Marshal, Alphonse Roy, telephoned the Grasmere warden about Sullivan.

"Ralph LaVallee in charge of Grasmere, admitted to this column that he had received a telephone inquiry from Roy as to whether Sullivan would be released in time to file. But the warden denied another report that Roy had announced he was calling 'on behalf of my friend Styles.'

"'I don't want to get implicated in anything like that,' said LaVallee, 'Roy didn't mention Senator Bridges.'

"Sullivan happily got out of the workhouse in time to run for the most distinguished legislative body in the world. And who should turn up on the ballot but the same Alphonse Roy who was so eager to get him out of the clink.

"Because of the peculiar population division of New Hampshire, the Irish Catholics may be inclined to vote for a Frank Sullivan while the French Canadians could be attracted by a name like Alphonse Roy. The effect would be to cut down Herb Hill's chances.

"Convicts For Senator

"Two other curious candidates, who tried to run in the Democratic primary against Hill, were Harold P. McCarthy who has a record of nine convictions for drunkenness, assault, and brawling, and Clement P. Robinson Jr., who has a record of six brushes with the law for drunkenness and traffic violations. Robinson also received a 30-day suspended sentence for stealing two power lawn-

The newspaper and NANA offered "truth" as their primary defense at trial, and evidence was presented on the issue of whether or not Roy had in fact been a bootlegger during the prohibition era. The defendants also alleged that they had published in good faith, without malice, with a reasonable belief in the probable truth of the charge, and on a lawful occasion. At the close of the evidence, the trial judge instructed the jury at great length on the law to be applied to the case. Three possible defenses emerged from these jury instructions.

First, the trial judge told the jury that Roy was a "public official" by virtue of his candidacy in the primary. As a consequence, a special rule, requiring a showing that the article was false and had been published with "knowledge of its falsity or with a reckless disregard of whether it was false or true," would apply so long as the libel concerned "official conduct" as opposed to "private conduct." This private-public distinction was elaborated as follows: "Is it more probable than otherwise that the publication that the plaintiff was a former small-time bootlegger was a public affair on a par with official conduct of public officials?" The trial judge went on:

> "As a candidate for the United States Senate, the plaintiff was within the public official concept, and a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office. That is, anything which might touch on Alphonse Roy's fitness for the office of United States Senator would come within the concept of official conduct. If it would not touch upon

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mowers and a conviction for the nonsupport of his wife and three children.

"But at least Professor Hill managed to persuade the New Hampshire Ballot Law Commission into knocking McCarthy and Robinson off the ballot."

> or be relevant to his fitness for the office for which he was a candidate but was rather a bringing forward of the plaintiff's long forgotten misconduct in which the public had no interest, then it would be a private matter in the private sector."

The judge then instructed the jury that if they found the libel to be in the "public sector" they must bring in a verdict for NANA, since there had been no evidence that NANA had engaged in knowing or reckless falsehood, but that they must still decide on the "preponderance of the evidence" whether the newspaper was liable.

Supposing the publication to be in the "private sector," the trial judge instructed the jury that there were two possible defenses available to the newspaper and NANA. The first was "justification," which would prevail if the jury found that the article was both true and published on a "lawful occasion." [2] The second defense was "conditional privilege," which could prevail even if the jury found the article to be false, but only if they also found that its publication was "on a lawful occasion, in good faith, for a justifiable purpose, and with a belief founded on reasonable grounds of the truth of the matter published."

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[2] The trial judge gave the jury the following definition of a "lawful occasion":

"If the end to be attained by the publication is justifiable, that is, to give useful information to those who have a right and ought to know in order that they may act upon such information, the occasion is lawful. Where, however, there is merely the color of a lawful occasion and the defendant, instead of acting in good faith, assumes to act for some justifiable end merely as a pretense to publish and circulate defamatory matter, or for other unlawful purposes, he is liable in the same manner as if such pretense had not been resorted to."

The trial judge placed the burden of showing a "lawful occasion" on the defendants.

The jury returned a verdict of $20,000, of which $10,000 was against the newspaper and $10,000 against NANA. On appeal, the New Hampshire Supreme Court affirmed the judgment, holding that the trial judge properly sent to the jury the question of whether or not the particular libel alleged was "relevant" to Roy's fitness for office. 109 N. H. 441, 254 A. 2d 832. We granted certiorari in order to consider the constitutional issues presented by the case. 397 U. S. 904.

I

In *New York Times* v. *Sullivan*, 376 U. S. 254, 279–280, we held that the First and Fourteenth Amendments require "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The rule of *New York Times* was based on a recognition that the First Amendment guaranty of a free press is inevitably in tension with state libel laws designed to secure society's interest in the protection of individual reputation. The approach of *New York Times* was to identify a class of person—there public officials—and a type of activity—there official conduct—and to require as to defamations respecting them a particularly high standard of liability—knowing falsehood or reckless disregard of the truth. Later cases have made it clear that the applicability of this basic approach is not limited to those in public office or to the performance of official acts, or, for that matter, to conventional civil libel suits. *Garrison* v. *Louisiana*, 379 U. S. 64; *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130; *Greenbelt Cooperative Publishing Association* v. *Bresler*, 398 U. S. 6.

This case went to the jury in December 1966, after our decisions in *New York Times* and *Garrison*, but before *Curtis* and *Greenbelt*. The trial judge instructed the jury that Roy, as a candidate for elective public office, was a "public official," and that characterization has not been challenged here. Given the later cases, it might be preferable to categorize a candidate as a "public figure," if for no other reason than to avoid straining the common meaning of words. But the question is of no importance so far as the standard of liability in this case is concerned, for it is abundantly clear that, whichever term is applied, publications concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office. That *New York Times* itself was intended to apply to candidates, in spite of the use of the more restricted "public official" terminology, is readily apparent from that opinion's text and citations to case law.[3] And if it be conceded that the First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth* v. *United States*, 354 U. S. 476, 484, then it can hardly be doubted that the constitutional guaranty has its full-

[3] One of the citations was to a Kansas decision which admirably stated the case for the inclusion of candidates within the rule:

"It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged." *Coleman* v. *MacLennan*, 78 Kan. 711, 724, 98 P. 281, 286 (1908).

est and most urgent application precisely to the conduct of campaigns for political office.

II

The jury in this case returned verdicts against both the newspaper and NANA. It is clear, therefore, that they found the bootlegger charge to be in the "private sector," since they had been instructed that unless they so found they could not impose liability on NANA. It is possible that having made this determination, they then concluded that the charge was true but "unjustified"—that is, that it had been published without a "lawful occasion." In any event, under the trial judge's instructions they were also free to return a money verdict if they found that the publication was false and had not been made "in good faith," for a "justifiable purpose," and with a "belief founded on reasonable grounds of the truth of the matter published." Since this standard is far less stringent than that of knowing falsehood or reckless disregard of the truth, the judgment must be reversed unless it can be shown that the *New York Times* rule is not applicable because of the nature of the libel in question. Cf. *Ocala Star-Banner* v. *Damron, post.*

The respondent argues that under *New York Times* a plaintiff has a special burden of proof only as to libels "relating to official conduct," that for a candidate "official conduct" means "conduct relevant to fitness for office," and that the public-private issue is one of fact for the jury. In our view, however, the syllogistic manipulation of distinctions between "private sectors" and "public sectors," or matters of fact and matters of law, is of little utility in resolving questions of First Amendment protection.

In *Garrison* v. *Louisiana, supra,* we reversed a conviction for criminal libel of a man who had charged that

a group of state court judges were inefficient, took excessive vacations, opposed official investigations of vice, and were possibly subject to "racketeer influences." The Louisiana Supreme Court had held that these statements were not "criticisms . . . of the manner in which any one of the eight judges conducted his court when in session," but rather were "accusations of crime" and "personal attacks upon the integrity and honesty" of the judges. This Court rejected the proposed distinction:

> "Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." 379 U. S., at 76–77.

Cf. *Ocala Star-Banner* v. *Damron, post.*

The considerations that led us thus to reformulate the "official conduct" rule of *New York Times* in terms of "anything which might touch on an official's fitness for office" apply with special force to the case of the candidate. Indeed, whatever vitality the "official conduct" concept may retain with regard to occupants of public office, cf. *Garrison, supra,* 379 U. S., at 72, n. 8, it is clearly of little applicability in the context of an election campaign. The principal activity of a candidate in our political system, his "office," so to speak, consists

in putting before the voters every conceivable aspect of his public and private life which he thinks may lead the electorate to gain a good impression of him. A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of "purely private" concern. And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry "Foul!" when an opponent or an industrious reporter attempts to demonstrate the contrary.[4] Any test adequate to safeguard First Amendment guarantees in this area must go far beyond the customary meaning of the phrase "official conduct."

Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogther without relevance to his fitness for the office he seeks. The clash of reputations is the staple of election campaigns, and damage to reputation is of course the essence of libel. But whether there remains some exiguous area of defamation against which a candidate may have full recourse is a question we need not decide in this case. The trial judge presented the issue to the jury in the form of the question "Is it more probable than otherwise that the publication that the plaintiff was a former small-time bootlegger was a public affair on a par with official conduct of public officials?" This instruction, and the others like it, left the jury far more

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[4] A commentator writing in 1949 described the ambience as follows: "Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like have usually filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent. If actionable defamation is possible in this field, one might suppose that the chief energies of the courts, for some time after every political campaign, would be absorbed by libel and slander suits." Noel, Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875.

leeway to act as censors than is consistent with the protection of the First and Fourteenth Amendments in the setting of a political campaign.

The application of the traditional concepts of tort law to the conduct of a political campaign is bound to raise dangers for freedom of speech and of the press. The reasonable-man standard of liability, for example, serves admirably the essential function of imposing an objective and socially acceptable limit on the freedom of an individual to act with relation to others. But under our system of government, we have chosen to afford protection even to "opinions that we loathe and believe to be fraught with death," *Abrams* v. *United States*, 250 U. S. 616, 630 (Holmes, J., dissenting). A community which imposed legal liability on all statements in a political campaign deemed "unreasonable" by a jury would have abandoned the First Amendment as we know it. Likewise, a "preponderance of the evidence" burden of proof plays an indispensable role in the control of private negligence. But we have recognized that in the realm of political belief "the tenets of one man may seem the rankest error to his neighbor," and that the advocates whom we protect may resort to "exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement," *Cantwell* v. *Connecticut*, 310 U. S. 296, 310. It is simply inconsistent with this commitment to permit the imposition of liability for political speech which "more probably than otherwise" in the opinion of the jury "would not touch upon or be relevant" to a candidate's fitness for office. Cf. *Speiser* v. *Randall*, 357 U. S. 513, 525–526; *Smith* v. *California*, 361 U. S. 147.

It is perhaps unavoidable that in the area of tension between the Constitution and the various state laws of defamation there will be some uncertainty as to what

publications are and what are not protected. The mental element of "knowing or reckless disregard" required under the *New York Times* test, for example, is not always easy of ascertainment. "Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law." *St. Amant* v. *Thompson*, 390 U. S. 727, 730–731. But there is a major and in this case decisive difference between liability based on a standard of care, and liability based on a judgment of the "relevance" of a past incident of criminal conduct to an official's or a candidate's fitness for office. A standard of care "can be neutral with respect to content of the speech involved, free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood." *Curtis Publishing Co.* v. *Butts, supra*, at 153 (opinion of HARLAN, J.). A standard of "relevance," on the other hand, especially such a standard applied by a jury under the preponderance of the evidence test, is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those "vehement, caustic, and sometimes unpleasantly sharp attacks," *New York Times, supra*, at 270, which must be protected if the guarantees of the First and Fourteenth Amendment are to prevail.

We therefore hold as a matter of constitutional law that a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the "knowing falsehood or reckless disregard" rule of *New York Times* v. *Sullivan*. Since the

jury in this case was permitted to make its own unguided determination that the charge of prior criminal activity was not "relevant," and that the *New York Times* standard was thus inapplicable, the judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

For concurring opinion of MR. JUSTICE WHITE in this case, see No. 118.

SUPREME COURT OF THE UNITED STATES

Nos. 62, 109, AND 118.—OCTOBER TERM, 1970

Monitor Patriot Co. et al., Petitioners, v. Roselle A. Roy, Etc.	On Writ of Certiorari to the Supreme Court of New Hampshire.
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Ocala Star-Banner Company et al., Petitioners, v. Leonard Damron.	On Writ of Certiorari to the District Court of Appeal of Florida, First District.
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[February 24, 1971]

Separate opinion of MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins.

I concur in the judgments of the Court in No. 62, No. 109, and No. 118, for the reasons set out in my concurring opinion in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 293 (1964), in my concurring and dissenting opinion in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 170 (1967), and in MR. JUSTICE DOUGLAS' concurring opinion in *Garrison* v. *Louisiana*, 379 U. S. 64, 80 (1964). However, I dissent from those portions of the opinions in No. 62 and No. 118 which would permit these libel cases to be tried again under a different set of jury instructions. As I have stated before, "[I]t is time for this Court to abandon *New York Times Co.* v. *Sullivan* and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments." *Curtis Publishing Co.* v. *Butts*, *supra*, at 172 (BLACK, J., concurring and dissenting).